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Supreme Court, U.S.
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OFFICE OF THE CLERK

In The Supreme Court of the United States

STATE OF LOUISIANA, THROUGH THE
LOUISIANA DEPARTMENT OF TRANSPORTATION
AND DEVELOPMENT,
Petitioner,

v.

LELIA MARIE TASSIN, WIFE OF/AND
IRVING C. TASSIN, JR., ET AL.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE LOUISIANA
FOURTH CIRCUIT COURT OF APPEAL

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. May state law wrongful death and personal injury tort actions be predicated upon a claim of inadequate design of an interstate highway guardrail struck by a 40,000 pound intercity bus when the guardrail installation is approved by the Secretary of Transportation through the Federal Highway Administration, and conforms with the Congressional mandate of Section 1073 of the Intermodal Surface Transportation Efficiency Act of 1991 (ISTEA Section 1073), Pub. L. 102-240 § 1073, 105 Stat. 1914, 2015, directing the Secretary of Transportation to implement standards and guidelines for the installation of acceptable roadside barriers and other safety appurtenances "which shall accommodate vans, mini-vans, pickup trucks, and 4-wheel drive vehicles"?

2. Does ISTEA Section 1073 establish a federal crashworthiness design standard for guardrails on the interstate highway system; and do federal design standards or guidelines for interstate highway guardrails require accommodation of a 40,000 pound intercity bus notwithstanding ISTEA Section 1073?

LIST OF PARTIES

PETITIONER:

The petitioner, Louisiana Department of Transportation and Development (LaDOTD), is an arm of the State of Louisiana in the executive branch of state government. As a result, LaDOTD is not required by Rule 29.6 to include a corporate disclosure statement in this petition.

LaDOTD is the only defendant and appellant in each of the consolidated actions before the Louisiana Fourth Circuit Court of Appeal whose judgment is sought to be reviewed.

RESPONDENTS:

The respondents listed in the caption, Lelia Marie Tassin and Irving C. Tassin, Jr. – both plaintiffs and appellees before the Louisiana Fourth Circuit Court of Appeal – are further identified by their consolidated case number on the judgment of the Louisiana Fourth Circuit Court of Appeal sought to be reviewed, which also serves as the lead case number of the consolidated appeals: 2007 CA 1119.

The following additional respondents – not listed on the caption – are also plaintiffs and appellees before the Louisiana Fourth Circuit Court of Appeal in the consolidated action. They are further identified by their respective consolidated case numbers on the judgment of the Louisiana Fourth Circuit Court of Appeal sought to be reviewed:

Bernard Williams 2007-CA-1120

Anton Zorick	2007-CA-1121
Robert Torres, Sr.	2007-CA-1122
Robert Torres, Jr.	2007-CA-1122
Barry Paul Torres	2007-CA-1122
Brian Joseph Torres	2007-CA-1122
Hilda Maria Alexander	2007-CA-1123
Lucien J. Gauff, Jr.	2007-CA-1124
Lucien J. Gauff, III	2007-CA-1124
Chermain Gauff Guerin	2007-CA-1124
Erroll M. Gauff	2007-CA-1124
Gloria Hotard	2007-CA-1125
Judy LaFontaine	2007-CA-1125
Joseph Oubre, Sr.	2007-CA-1125
Lois Ponville	2007-CA-1126
Milton Ponville	2007-CA-1126
Deborah A. Scanlan	2007-CA-1127
Barbara J. Gibson	2007-CA-1128
Thomas J. Bryant	2007-CA-1128
Pallie Miller	2007-CA-1128
Eula Ordoyne	2007-CA-1128
William Bryant, Jr.	2007-CA-1128
Brenda Samrow	2007-CA-1128
Hubert Remondet, Jr.	2007-CA-1129
Sandra Remondet	2007-CA-1129
Johnny Remondet	2007-CA-1129
Barbara Gibson	2007-CA-1130
Joseph LaBranche	2007-CA-1131
Carl LaBranche	2007-CA-1131
Stacy Tassin	2007-CA-1132
Earline Gueret	2007-CA-1133
Joseph Gueret	2007-CA-1133
Mary Townson	2007-CA-1134
Aline Gueret	2007-CA-1135
Kathy Tassin	2007-CA-1136
George Tassin	2007-CA-1136
Joan Marie George	2007-CA-1137

Joan Marie George	2007-CA-1138
Sandra Agee-Mancuso	2007-CA-1139
Lorraine Agee-Wright	2007-CA-1139
Mandy Agee-Wolf	2007-CA-1139
Jesse Agee	2007-CA-1139
Betty Mae Agee-Dutter	2007-CA-1139
William Brenner, II	2007-CA-1140
Darrell Mathieu, Sr.	2007-CA-1141
Rosana Mathieu Garnett	2007-CA-1141
Theresa Victor	2007-CA-1142
Dorothy Borne	2007-CA-1143
Lawrence Lee Cook	2007-CA-1144
Josephine Bruce	2007-CA-1145
Pearl V. Badeaux	2007-CA-1146
Anna Belle Stein Ockman	2007-CA-1147
Madeline Deters Campagna	2007-CA-1148
Alberta Deters Bonnin	2007-CA-1148
Don Gauthier	2007-CA-1149
Tim Richard	2007-CA-1150
Michael Richard	2007-CA-1150
Jessee Agee	2007-CA-1151
Clarence Agee	2007-CA-1151
Edward Farrell	2007-CA-1152
Deborah Johnston	2007-CA-1153
Linda Johnston Saber	2007-CA-1153
Carl Doisher	2007-CA-1153
Jimmie Doisher	2007-CA-1153
Ennis Doisher	2007-CA-1153
Lorraine Agee Wright	2007-CA-1154
Keith J. Cambre	2007-CA-1155
Gloria Dechara	2007-CA-1156
Susan Guidry	2007-CA-1498
Nancy Desselle	2007-CA-1498

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B. The Louisiana Fourth Circuit Court of Appeal has decided that a federally approved interstate highway guardrail not capable of accommodating a 40,000 pound intercity bus constitutes a negligently unsafe design – notwithstanding that Congress, through Section 1073 of the Intermodal Surface Transportation Efficiency Act of 1991, mandated that the Secretary of Transportation implement standards and guidelines for the installation of guardrails accommodating "vans, mini-vans, pickup trucks, and 4-wheel drive vehicles". This decision on an important question of federal law has not been, but should be, settled by this Court. 18

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I.
PETITION

The State of Louisiana, through the Louisiana Department of Transportation and Development (LaDOTD), petitions this Court for a writ of certiorari to review the judgment of the Louisiana Fourth Circuit Court of Appeal dated July 9, 2008, in the consolidated civil action entitled " Lelia Marie Tassin v. Frank Bendel, et al", No. 2007-CA-1119, c/w Nos. 2007-CA-1120, 2007-CA-1121, 2007 CA 1122, 2007 CA 1123, 2007 CA 1124, 2007 CA 1125, 2007 CA 1126, 2007 CA 1127, 2007 CA 1128, 2007 CA 1129, 2007 CA 1130, 2007 CA 1131, 2007 CA 1132, 2007 CA 1133, 2007 CA 1134, 2007 CA 1135, 2007 CA 1136, 2007 CA 1137, 2007 CA 1138, 2007 CA 1139, 2007 CA 1140, 2007 CA 1141, 2007 CA 1142, 2007 CA 1143, 2007 CA 1144, 2007 CA 1145, 2007 CA 1146, 2007 CA 1147, 2007 CA 1148, 2007 CA 1149, 2007 CA 1150, 2007 CA 1151, 2007 CA 1152, 2007 CA 1153, 2007 CA 1154, 2007 CA 1155, 2007 CA 1156, 2007 CA 1498

II.
OFFICIAL CITATION OF THE REPORT OF THE JUDGMENT SOUGHT TO BE REVIEWED

The official citation of the report of the Louisiana Fourth Circuit Court of Appeal judgment sought to be reviewed, and the citation of the report of the Supreme Court of Louisiana order denying writs of certiorari and review is: *Tassin v. Bendel*, 2007 CA 1119 (La. App. 4th Cir. 7/9/08), 989 So. 2d 217, writs denied, 2008-1940 (La. 11/10/08) ··· So. 2d ···, 2008 WL 5433355.

II.
STATEMENT OF JURISDICTION

The judgment of the Louisiana Fourth Circuit Court of Appeal sought to be reviewed was entered on July 9, 2008.

On August 8, 2008, LaDOTD filed an application for writs of certiorari in the Supreme Court of Louisiana within the 30 day delay allowed by the Rules of the Supreme Court of Louisiana., Rule 10 (5) (a).

On November 10, 2008, the Supreme Court of Louisiana entered an order denying LaDOTD's application for writs of certiorari.

According to 28 U. S. C. § 2101 (c) and Rule 13 of this Court, LaDOTD's petition for writs of certiorari must be filed with the Clerk of this Court not later than February 8, 2009 (90 days after November 10, 2008).

28 U. S C. § 1257 confers on this Court jurisdiction to review on a writ of certiorari the judgment in question.

III.
CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED IN THE CASE

1. U. S. Const. art. VI cl. 2:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

2. 23 U. S. C. § 103 (c) (1) (B) (i):

> Except as provided in clause (ii), highways on the Interstate System shall be designed in accordance with the standards of section 109(b).

3. 23 U. S. C. § 103 (c) (1) (B) (ii):

> Highways on the Interstate System in Alaska and Puerto Rico shall be designed in accordance with such geometric and construction standards as are adequate for current and probable future traffic demands and the needs of the locality of the highway.

4. 23 U. S. C. § 103(c) (3):

> The Secretary may approve or require modifications to the Interstate System in a manner consistent with the policies and procedures established under this subsection.

5. 23 U. S. C. § 109 (b):

> The geometric and construction standards to be adopted for the Interstate System shall be those approved by the Secretary in cooperation with the State transportation departments. Such standards, as applied to each actual construction project, shall be adequate to enable such project to accommodate the types and volumes of traffic anticipated for such project for the twenty-year period commencing on the date of approval by the Secretary, under section 106 of this title, of the plans, specifications, and estimates for actual construction of such project. Such standards shall in all cases provide for at least four lanes of traffic. The right-of-way width of the Interstate System shall be adequate to permit construction of projects on the Interstate System to such standards. The Secretary shall apply such standards uniformly throughout all the States.

6. 23 U. S. C. § 109 (o):

> Compliance with State laws for non-NHS projects.--Projects (other than highway projects on the National Highway System) shall be designed, constructed, operated, and maintained in accordance with State laws, regulations, directives, safety standards, design standards, and construction standards.

7. 23 U. S. C. § 106 (a) (1) and (4):

(1) Submission of plans, specifications, and estimates.--Except as otherwise provided in this section, each State transportation department shall submit to the Secretary for approval such plans, specifications, and estimates for each proposed project as the Secretary may require. . . .

(4) In taking action under this subsection, the Secretary shall be guided by section 109.

8. 23 U. S. C. § 106 (c) (1):

Non-Interstate NHS projects.--For projects under this title that are on the National Highway System but not on the Interstate System, the State may assume the responsibilities of the Secretary under this title for design, plans, specifications, estimates, contract awards, and inspections of projects unless the State or the Secretary determines that such assumption is not appropriate.

9. 23 C. F. R. § 630.106(a) [Until April 1, 2002]:

(a) The FHWA issuance of an authorization to proceed with a Federal-aid project shall be in response to a written request from the State highway agency (SHA). Authorization can be given only after applicable prerequisite requirements of Federal laws and implementing regulations and directives have been satisfied.

10. 23 C. F. R. § 630.106(a) [Effective April 1, 2002]:

(a)(1) The State transportation department (STD) must obtain an authorization to proceed from the FHWA before beginning work on any Federal-aid project. The STD may request an authorization to proceed in writing or by electronic mail for a project or a group of projects.

(2) The FHWA will issue the authorization to proceed either through or after the execution of a formal project agreement with the State. The agreement can be executed only after applicable prerequisite requirements of Federal laws and implementing regulations and directives are satisfied. Except as provided in paragraphs (c) (1) through (c) (4) of this section, the FHWA will obligate Federal funds in the project or group of projects upon execution of the project agreement.

11. 23 C. F. R. § 630.205:

(a) The contents and number of copies of the PS&E[1] assembly shall be determined by the FHWA.

(b) Plans and specifications shall describe the location and design features and the construction requirements in sufficient detail to facilitate the construction, the contract control and the estimation of construction costs of the project. The estimate shall reflect the anticipated cost of the project in sufficient detail to provide an initial prediction of the financial obligations to be incurred by the State

[1] "PS&E" as used in 23 C. F. R. § 630.205 is the acronym of "Plans, Specifications and Estimates".

and FHWA and to permit an effective review and comparison of the bids received.
(c) PS&E assemblies for Federal-aid highway projects shall be submitted to the FHWA for approval.
(d) The State highway agency (SHA) shall be advised of approval of the PS&E by the FHWA.
(e) No project or part thereof for actual construction shall be advertised for contract nor work commenced by force account until the PS&E has been approved by the FHWA and the SHA has been so notified."

12. Section 1073 of the Intermodal Surface Transportation Efficiency Act of 1991, Pub. L. 102-240 § 1073, 105 Stat. 1914, 2015:

(a) Initiation of rulemaking proceeding.--Not later than 30 days after the date of the enactment of this Act [Dec. 18, 1991], the Secretary shall initiate a rulemaking proceeding to revise the guidelines and establish standards for installation of roadside barriers and other safety appurtenances, including longitudinal barriers, end terminals, and crash cushions. Such rulemaking shall reflect state-of-the-art designs, testing, and evaluation criteria contained in the National Cooperative Highway Research Program Report 230, relating to approval standards which provide an enhanced level of crashworthy performance to accommodate vans, mini-vans, pickup trucks, and 4-wheel drive vehicles.
(b) Final rule.--Not later than 1 year after the date of the enactment of this Act [Dec. 18,

1991], the Secretary shall complete the rulemaking proceeding initiated under subsection (a), and issue a final rule regarding the implementation of revised guidelines and standards for acceptable roadside barriers and other safety appurtenances, including longitudinal barriers, end terminals, and crash cushions. Such revised guidelines and standards shall accommodate vans, mini-vans, pickup trucks, and 4-wheel drive vehicles and shall be applicable to the refurbishment and replacement of existing roadside barriers and safety appurtenances as well as to the installation of new roadside barriers and safety appurtenances.

13. 23 U. S. C. § 1220 (a) (1):

(a) Interstate System projects.--
(1) In general.--Except as otherwise provided in this chapter, the Federal share payable on account of any project on the Interstate System (including a project to add high occupancy vehicle lanes and a project to add auxiliary lanes but excluding a project to add any other lanes) shall be 90 percent of the total cost thereof, plus a percentage of the remaining 10 percent of such cost in any State containing unappropriated and unreserved public lands and nontaxable Indian lands, individual and tribal, exceeding 5 percent of the total area of all lands therein, equal to the percentage that the area of such lands in such State is of its total area; except that such Federal share payable on any project in any State shall not

exceed 95 percent of the total cost of such project.

IV.
STATEMENT OF THE CASE

A. STATEMENT OF FACTS

1. THE ACCIDENT

On the morning of May 9, 1999, Frank Bedell[2] operated a 40,000 pound inter-city bus traveling in New Orleans eastbound on an interstate highway known as I-610. The bus was en-route from La Place, Louisiana, to a casino in Bay St. Louis, Mississippi. Forty-three passengers were aboard.

The bus occupied the left eastbound travel lane. An unknown green automobile occupied the middle lane. Without signaling, Frank Bedell attempted to move the bus to the middle lane. He swerved the bus back to the center of the left lane in reaction to the presence of the green automobile. Meanwhile, the green automobile slowed to allow the bus to change lanes. The bus remained in the left lane until the green vehicle dropped back sufficiently to allow the bus to move into the middle lane. Frank Bedell steered the bus to the right. The bus gradually crossed all of the traffic lanes and traveled completely off of the roadway at a speed of 50 to 60 miles per hour. There is no evidence that the green automobile caused or contributed to the bus leaving the roadway.

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[2] The lead case caption in the consolidated action misspells the driver's name as "Bendel". His last name is actually "Bedell".

Once the bus left the roadway, Frank Bedell drove it across the right side shoulder of the roadside and continued onto the grassy median alongside the shoulder. The bus proceeded on the grassy median, struck the breakaway terminal of a guardrail, vaulted over a golf cart path, collided with the far side embankment of the golf cart path, and slid forward upright until it stopped. Twenty two bus passengers died. Twenty one others were injured. Although he initially survived the collision with injuries, Frank Bedell also died.

There is no evidence that Frank Bedell ever applied his brakes prior to colliding with the far side embankment of the golf cart path. In fact, the cruise control of the bus was found in the "on" position after the collision.

The roadway and median were dry at the time of the accident. The I-610 eastbound travel lanes approaching the accident site were level and straight. The I-610 bridge over the golf cart path was practically level with the surface of the approach travel lanes of the highway. The speed limit was 60 miles per hour. The lines marking the travel lanes were in good condition and clearly visible. The travel lanes met the lane width and space requirements of the Manual on Uniform Traffic Control Devices. The outside shoulder was paved with asphalt. The outside right of way also included a grassy median.

There was absolutely no evidence of any: a) road surface, outside shoulder, or grassy median defect; b) road surface condition causing the bus to leave the traffic lanes and travel onto the shoulder; c) shoulder condition causing the bus to leave the shoulder and travel onto the grassy median; or d) shoulder condition preventing the bus from returning to the traffic lanes.

2. THE GUARDRAIL SYSTEM

The eastbound I-610 bridge over the golf cart path included 27-inch tall bridge rails on both sides. The approach end of the outside bridge rail was connected to a 27-inch tall wood strong-post w-beam guardrail. The approach end of the guardrail was shielded with a breakaway cable terminal. The breakaway terminal is designed to break on impact to allow vehicles to penetrate beyond the barrier. The function of the terminal is to prevent a vehicle from both spearing the end of the guardrail and rolling over. The first two posts of the guardrail system form part of the breakaway terminal; and they are drilled with holes to facilitate fracture of the posts. The bus collided with the guardrail between the first two posts. The breakaway cable terminal broke away upon impact by the bus – as it was designed to do.

A strong post w-beam guardrail system with a breakaway cable terminal had been in place at the approach to the bridge over the golf cart path since the original construction of I-610 in the early 1970s. The plaintiffs' highway engineering expert admitted that the strong post w-beam guardrail was an appropriate design at the time of the original construction of I-610; and he did not attest to any change of circumstances requiring a different design at the time of LaDOTD's I-610 Rehabilitation Project which constructed the guardrail struck by the bus.

In 1987, LaDOTD prepared plans to rehabilitate the travel lanes and roadside guardrail system on I-610 in the vicinity of, and including, the bridge over the golf cart path. ("I-610 Rehabilitation Project"). The plans depict and specify a strong post

w-beam guardrail system with a breakaway cable terminal for installation at the roadside approaches of the bridge overpassing the golf cart path – the same type of guardrail system that had been used at the site since the original construction of I-610 Those plans were approved by the Federal Highway Administration ("FHWA") following a "plan in hand" inspection in 1987. The FHWA representative did not recommend or require any upgrades for those guardrails.

3. THE GOLF CART PATH

The construction of I-610 traversed certain pre-existing golf facilities of New Orleans City Park. Federal law required that interstate highway construction projects "minimize harm" to a traversed public park or recreation area. 23 U. S. C. § 138. Accordingly, a bridge was built on I-610 to overpass the golf cart path that connected the park's golf facilities. This golf cart path was included on the I-610 Rehabilitation Project plans approved by FHWA.

The travel lane of the golf cart path within the I-610 right of way was situated below the grade of the surrounding flat land of the interstate highway and right of way. An earthen embankment with a height of 8 feet below the highway grade adjoined each side of the golf cart travel lane. The slope of each earthen embankment was approximately 20 degrees. This shallow slope had remained unchanged from the time of the construction of I-610 through the date of the bus accident.

B. PRESENTATION OF THE FEDERAL QUESTIONS IN THE STATE COURT

1. In the Trial Court

An exhibit introduced into evidence without objection at the trial in the court of original jurisdiction, Civil District Court for the Parish of Orleans, expressly referenced the federal safety standard for roadside longitudinal barriers established by ISTEA Section 1073. Specifically, trial exhibit D- 63, National Cooperative Highway Research Program Report 350 (NCHRP 350) declared [at p. A-7]:

> Section 1073 of the Intermodal Surface Transportation Efficiency Act of 1991 mandated the development of standards for roadside barriers and other safety appurtenances '...which provide an enhanced level of crashworthy performance to accommodate vans, minivans, pickup trucks, and 4-wheel drive vehicles ...'

The Louisiana Fourth Circuit Court of Appeal's majority opinion acknowledges that the trial court record included evidence that federal regulations did not require LaDOTD to provide a guardrail capable of redirecting the bus: "DOTD's experts testified that federal regulations at the time of the accident did not require that the guardrail be capable of redirecting a 35,000 – 40,000 pound bus."

2. In the Louisiana Fourth Circuit Court of Appeal

The Statement of Issues of LaDOTD's brief on appeal in the Louisiana Fourth Circuit Court of Appeal included the following:

> 2. Does federal law determine the applicable design standards for interstate highway system guardrails?
> 3. Did DOTD breach any federal design standards in designing, specifying and using a wood strong-post w-beam guardrail system for the I-610 overpass of the golf cart path?

LaDOTD's brief on appeal in the Louisiana Fourth Circuit Court of Appeal included argument concerning the application of ISTEA Section 1073 and federal interstate highway design standards to the circumstances of the case. The following excerpts from summarize and substantiate the presentation of that argument:

> i. A. Section 1073 of the Intermodal Surface Transportation Efficiency Act of 1991 requires that longitudinal barriers on interstate highways accommodate "vans, mini-vans, pickup trucks, and 4-wheel drive vehicles" - - not intercity buses.
>
> Federal law, which provides a national standard for safety appurtenances used on interstate highways, does not require DOTD to provide a roadside barrier capable of redirecting a 40,000 inter-city bus on I-610. Section 1073 of the Intermodal Surface Transportation Efficiency Act of 1991 ("ISTEA"), Pub. L. 102-240, 105 Stat. 1914, requires that guidelines and standards for acceptable roadside barriers and other safety

appurtenances, including longitudinal barriers, end terminals, and crash cushions shall accommodate 'vans, mini-vans, pickup trucks, and 4-wheel drive vehicles'.

ii. Acting on the authority of both 23 U.S.C. 109(b) and ISTEA Section 1073, the Federal Highway Administration adopted final regulations effective May 1, 1997, designating the "standards, policies, and standard specifications that are acceptable to the Federal Highway Administration (FHWA) for application in the geometric design of highways." 23 C. F. R. Part 625, § 625.1. These regulations establish federal standards for work on the National Highway System regardless of the funding source. 23 C. F. R. Part 625, § 625.3(d). Standards, policies, and standard specifications incorporated by reference into the federal regulations are listed in 23 C. F. R. Part 625, § 625.4. None of these regulations require longitudinal roadside barriers capable of redirecting or accommodating 40,000 pound inter-city buses.

iii. "According to 23 U.S.C. §109(b), design standards for interstate highways are to be adopted by the U. S. Transportation Secretary in cooperation with State transportation departments, and must be 'uniformly applied throughout all the States'.

iv. "Construction of the guardrail struck by the bus could not have been either commenced or completed without first obtaining federal approval of the guardrails plans. The

commitment for federal funding of an interstate highway rehabilitation project is predicated upon federal approval of the plans and specifications. 23 U. S. C. §106(a).

3. In the Supreme Court of Louisiana

LaDOTD's application for writs of certiorari filed with the Supreme Court of Louisiana likewise presented the federal questions presented by the petition for writs of certiorari filed this Court. For example, LaDOTD's Louisiana Supreme Court application for writs included the following Writ Grant Considerations remarks:

> i. Federal statutory law has determined that longitudinal barriers installed on the interstate highway system throughout the nation "shall accommodate vans, mini-vans, pick-up trucks and 4-wheel drive vehicles". ISTEA of 1991, Section 1073(a) and (b), Pub. L. 102-241, 105 Stat. 1914 ("ISTEA Section 1073"). This interstate highway design and construction standard is intended to be "uniformly applied throughout all the States." 23 U. S. C. 109(b). The strong post w-beam guardrail struck by the bus on I-610 met this federal standard.
>
> ii. This Honorable Court should also consider whether the lower courts' disregard for the federal crashworthiness standard for barriers installed on interstate highways set forth by ISTEA Section 1073, and the requirement for uniform application of those standards throughout all of the States pursuant to 28 U. S. C. § 109(b), violates Article VI, Clause 2, of

> the U. S. Constitution [Supremacy Clause], notwithstanding that such federal laws do not preempt Louisiana tort law causes of action. In applying state civil tort remedies against DOTD, the federal doctrine of "conflict preemption" requires the judges of this State to conform with ISTEA Section 1073 and 28 U. S. C. § 109(b) in defining the scope of DOTD's duty with respect to the crashworthiness of the roadside barrier provided on I-610 at the approach to the bridge over the golf cart path.

LaDOTD's Louisiana Supreme Court application for writs included the following Assignment of Error:

> The lower courts were wrong in finding that DOTD's roadside barrier presented an unreasonable risk of harm notwithstanding the fact that the barrier system satisfied the federal statutory standard – intended for uniform application throughout all of the States – that roadside barriers on the interstate highway system 'accommodate vans, mini-vans, pick-up trucks and 4-wheel drive vehicles'.

V.
REASONS FOR GRANTING THE PETITION

A. The Louisiana Fourth Circuit Court of Appeal judgment treats federal law concerning the adequacy and responsibility for the design of guardrails on the interstate highway system in a way that conflicts with this Court's decision in *Norfolk Southern Railway Company v. Shanklin*, 529 U. S. 344, 120 S. Ct. 1467, 146 L. Ed. 2d 374 (2000).

The judgment of the Louisiana Fourth Circuit Court of Appeal contravenes the preemption principles of *Norfolk Southern Railway Company v. Shanklin* (*Shanklin*), 529 U. S. 344, 120 S. Ct. 1467, 146 L. Ed 2d 374 (2000). To the same degree that it exerts comprehensive regulatory control over the nation's railroad system, federal law also directs the design, construction and safety of the interstate highway system. As a result, the preemption principles resolved by *Shanklin* in the context a railroad crossing accident apply with equal force to a wrongful death and personal injury action predicated on a claim of inadequate design and selection of an interstate highway roadside guardrail.

LaDOTD installed a federally approved guardrail along the roadside of the interstate highway at the accident site. The Federal Highway Administration (FHWA) approved the plans for the construction of the guardrail. The FHWA approved guardrail could accommodate automobiles, vans, mini-vans, pickup trucks, and 4-wheel drive vehicles – but not 40,000 pound intercity buses. Notwithstanding FHWA approval of that guardrail, the Louisiana Fourth Circuit Court of Appeal held

LaDOTD liable for negligent design because the guardrail failed to accommodate a 40,000 pound intercity bus. In doing so, the state judges completely disregarded federal statutory control over the design and construction standards for the interstate highway system, FHWA's approval of the design and plans for the roadside barrier, and an express Congressional determination that such roadside barriers accommodate vans, mini-vans, pickup trucks, and 4-wheel drive vehicles. U. S. Const. art. VI cl. 2, as interpreted by this Court in *Shanklin*, precludes the Louisiana Fourth Circuit Court of Appeal's dismissal of federal law.

In *Norfolk Southern Railway Company v. Shanklin*, supra, a widow sued Norfolk Southern Railway Company for damages claiming that her husband was killed in a crossing accident in Tennessee caused by the railroad's failure to maintain adequate warning devices. The warning signs posted at the crossing had been installed by the Tennessee Department of Transportation (TDOT) pursuant to the Federal Railway – Highway Crossings Program (Crossing Program) using federal funds. Regulations promulgated by FHWA to implement the Crossing Program included 23 C.F.R. § 646.214(b) (3) and (4), which addressed the adequacy of warning devices. The signs installed by TDOT at the crossing complied with the regulation. FHWA approved the TDOT sign installation project, and paid 99 % of its cost. This Court held that a tort claim based on inadequate warning devices was preempted by the Federal Railroad Safety Act (FRSA) in conjunction with 23 C.F.R. § 646.214(b)(3) and (4). *Id.* at 347, S. Ct. 1471. In doing so, this Court found: "When the FHWA approves a crossing improvement project and the State installs the

warning devices using federal funds, §§ 646.214(b)(3) and (4) establish a federal standard for the adequacy of those devices that displaces state tort law addressing the same subject." *Id.* at 357, S. Ct. 1476. This Court also remarked: "Whether the State should have originally installed different or additional devices, or whether conditions at the crossing have since changed such that automatic gates and flashing lights would be appropriate, is immaterial to the pre-emption question." *Id.* at 358, S. Ct. 1476.

The *Shanklin* opinion highlighted that FRSA was enacted "to promote safety in every area of railroad operations and reduce railroad-related accidents and incidents". *Id.* at 347, S. Ct. 1471, quoting 49 U. S. C. § 20101. This Court observed that FRSA granted the Secretary of Transportation authority to prescribe regulations for railroad safety and maintain a coordinated effort to develop and carry out solutions to the railroad grade crossing problem. *Ibid.* The *Shanklin* opinion emphasized the following express pre-emption provision in FRSA:

> Laws, regulations, and orders related to railroad safety shall be nationally uniform to the extent practicable. A State may adopt or continue in force a law, regulation, or order related to railroad safety until the Secretary of Transportation prescribes a regulation or issues an order covering the subject matter of the State requirement. 49 U. S. C. § 20106. *Id.* at 347-48, S. Ct. 1471.

Federal laws comparable to FRSA plainly remove interstate highway design and construction from control by the states. Congress expressly

mandates that the design and construction standards for the interstate highway system shall be those approved, and applied uniformly throughout all of the States, by the Secretary of Transportation. 23 U. S. C. § 103 (c) (1) (B)(i) ["...the Interstate System shall be designed in accordance with the standards of section 109(b)...]; 23 U. S. C. § 109 (b) ["The geometric and construction standards to be adopted for the Interstate System shall be those approved by the Secretary in cooperation with the State transportation departments. *** The Secretary shall apply such standards uniformly throughout all the States."]. Federal law also places in the hands of the Secretary of Transportation the power to authorize or require modifications of the interstate highway system. 23 U. S. C. § 103(c) (3).

Federalization of design and construction of the interstate highway system is even more comprehensive than provided for the railroad system by FRSA's express preemption quoted in *Shanklin*. While 49 U. S. C. § 20106 allows states to "adopt or continue in force" laws related to railroad safety until a regulation or order of the Secretary of Transportation covers the subject matter of the state requirement, the states do not have such regulatory latitude with respect to the design and construction of the interstate highway system. On the contrary, states are not authorized to assume the responsibilities of the Secretary of Transportation for the design, plans and specifications of interstate highway construction projects: "For projects under this title that are on the National Highway System but not on the Interstate System, the State may assume the responsibilities of the Secretary under this title for design, plans, specifications, estimates, contract awards, and inspections of projects ...".

(emphasis supplied) 23 U. S. C. § 106 (c) (1). Accordingly, a state law tort judgment which holds La DOTD responsible for the design, plans or specifications of a FHWA approved guardrail on the interstate highway system is in direct conflict with 23 U. S. C. § 106 (c) (1).

State law control over the design, safety and construction standards of federally funded highway projects expressly excludes projects on the National Highway System – of which the interstate highway system is a part: "Projects (other than highway projects on the National Highway System) shall be designed, constructed, operated, and maintained in accordance with State laws, regulations, directives, safety standards, design standards, and construction standards." (emphasis supplied) 23 U. S. C. § 109 (o). Thus, LaDOTD is prohibited by federal law from designing and constructing interstate highway guardrails in accordance with Louisiana law, safety standards, design standards, and construction standards.

Additionally, the Louisiana Fourth Circuit Court of Appeal's tort law crashworthiness standard for interstate highway guardrails conflicts with Section 1073 of the Intermodal Surface Transportation Efficiency Act of 1991 (ISTEA Section 1073), Pub. L. 102-240 § 1073, 105 Stat. 1914, 2015 – which requires the implementation of design standards for interstate highway guardrails to accommodate "vans, mini-vans, pickup trucks, and 4-wheel drive vehicles", as well as automobiles [This conflict is detailed in this petition's second argument in support of granting the writs of certiorari.].

The Louisiana Fourth Circuit Court of Appeal judgment completely ignored the fact that the plans

and specifications for the guardrail struck by the bus were approved by FHWA. Its failure to consider the effect of FHWA approval of the guardrail on LaDOTD's responsibility under tort law for design inadequacy placed the state court judgment at odds with *Shanklin*. This Court found in *Shanklin* that FHWA approval of the advance warning signs placed at the railroad crossing pursuant to the Crossing Program was outcome determinative in relieving TDOT of tort liability for a claim of inadequate design.

FHWA approves interstate highway project plans, and determines that the plans satisfy federal law, regulations and directives, before authorizing a state to proceed with construction. State transportation departments are required to submit all project plans and specifications for interstate highway construction to the Secretary of Transportation for approval. 23 U. S. C. § 106(a); 23 C. F. R. § 630.205(c). Construction of an interstate highway project cannot commence until FHWA approves the plans and notifies the state of that approval. 23 C. F. R. § 630.205(c). A state must obtain FHWA authorization to proceed with construction of an interstate highway project. FHWA will issue that authorization to proceed only after applicable prerequisite requirements of Federal laws and implementing regulations and directives are satisfied. 23 C. F. R. § 630.106(a).

Considering FHWA's comprehensive and exclusive responsibility and authority for, and control of, design standards, safety standards and construction standards for interstate highway construction projects, as well as the need for FHWA approval of plans before proceeding with construction, it is physically impossible for LaDOTD

to conform with the Louisiana Fourth Circuit Court of Appeal's tort law standard of care requiring that an interstate highway guardrail accommodate a 40,000 pound intercity bus. Federal law expressly: a) forbids interstate highway guardrails from being designed in accordance with state laws, regulations and safety standards; b) forbids a state from assuming FHWA's responsibilities for the design, plans and specifications of interstate highway guardrails; c) forbids a state from proceeding with construction of an interstate highway guardrail without first obtaining FHWA approval; and d) establishes a crashworthiness standard requiring that guardrails accommodate automobiles, vans, mini-vans, pickup trucks, and 4-wheel drive vehicles.

While LaDOTD submitted the guardrail plans to FHWA for approval, responsibility for the approved design rested exclusively in FHWA's hands – a responsibility which federal law expressly precluded LaDOTD from assuming. Just as FHWA is not answerable to the Louisiana Fourth Circuit Court of Appeal for its approval the design of the guardrail struck by the bus, LaDOTD should not be answerable under state tort law for implementing FHWA's guardrail design selection.

Assessing tort damages against LaDOTD for installing an FHWA approved guardrail on I-610 because the Fourth Circuit Court of Appeal is displeased with Congress' choice of guardrail crashworthiness standards frustrates, and stands as an obstacle to, accomplishment and execution of Congress' objectives for an interstate highway system designed and constructed in accordance with national standards applied "uniformly throughout all the States". 23 U. S. C. § 109 (b). Diverting funds to satisfy tort judgments reduces the availability to

LaDOTD of economic resources to participate in federal aid highway programs – which includes interstate highway construction and rehabilitation projects. Although the federal government pays 90 percent of the cost of interstate highway projects, a state is generally required to underwrite 10 percent of the cost. 23 U. S. C. § 120 (a) (1).

B. The Louisiana Fourth Circuit Court of Appeal has decided that a federally approved interstate highway guardrail not capable of accommodating a 40,000 pound intercity bus constitutes a negligently unsafe design – notwithstanding that Congress, through Section 1073 of the Intermodal Surface Transportation Efficiency Act of 1991, mandated that the Secretary of Transportation implement standards and guidelines for the installation of guardrails accommodating "vans, mini-vans, pickup trucks, and 4-wheel drive vehicles", as well as for automobiles. This decision on important questions of federal law has not been, but should be, settled by this Court.

Several years before the 1999 bus accident, Congress established a safety standard for the crashworthiness of interstate highway system roadside barriers which does not require accommodation of 40,000 pound intercity buses. Section 1073 of the Intermodal Surface Transportation Efficiency Act of 1991 (ISTEA Section 1073), Pub. L. 102-240 § 1073, 105 Stat. 1914, 2015, directed the Secretary of Transportation to implement standards and guidelines for the installation of acceptable roadside barriers and other safety appurtenances "which shall accommodate

vans, mini-vans, pickup trucks, and 4-wheel drive vehicles", as well as automobiles.

ISTEA Section 1073 has never been amended to require that guardrails on interstate highways be sufficiently crash worthy to redirect or "accommodate" vehicles larger than "vans, mini-vans, pickup trucks, and 4-wheel drive vehicles." Likewise, neither the Secretary of Transportation nor FHWA has ever adopted or implemented any rule, policy or regulation requiring that roadside barriers on interstate highways accommodate 40,000 pound intercity buses.

ISTEA Section 1073 expressly required that the rules providing for roadside barriers and safety appurtenances to "accommodate vans, mini-vans, pickup trucks, and 4-wheel drive vehicles" shall "reflect state-of-the-art designs, testing, and evaluation criteria contained in the National Cooperative Highway Research Program Report 230." The guardrail struck by the bus satisfied the requirements of National Cooperative Highway Research Program[3] Report 230 (NCHRP 230).

NCHRP Report 230 did not establish any standard designs, testing or evaluation criteria requiring that a roadside barrier on an interstate highway accommodate a 40,000 pound inter-city bus. Instead, the test matrix comprising the standard crashworthiness test criteria set forth by Table 3 of NCHRP Report 230 did not include any test vehicles larger than 4500 pounds.

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[3] Research projects of the National Cooperative Highway Research Program are sponsored and supported by FHWA and the American Association of State Highway and Transportation Officials (AASHTO). The research projects are conducted by The Transportation Research Board of the National Research Council (an agency of the National Academy of Sciences).

Although it included optional "supplemental" tests on vehicles heavier than 4500 pounds, NCHRP Report 230 expressly commented on the limitations of those tests:

> Five heavy test vehicles are included in Table 2 along with tentative static and dynamic properties. Although several agencies have begun using one or more of these vehicle types, experience accumulated to date is insufficient to clearly establish appropriateness of these vehicles for appurtenance testing or to establish experimentally verified static and dynamic properties for all five heavy vehicles.

Two years following the enactment of ISTEA Section 1073, National Cooperative Highway Research Program Report 350 (NCHRP 350) replaced the barrier crashworthiness testing criteria of NCHRP 230. National Cooperative Highway Research Program Report 244 (NCHRP 244) reported: "When Report 350 was published, FHWA decided to formally adopt Report 350 as one of its 'guides and references' when judging the acceptability of roadside hardware."

NCHRP 350 establishes six test levels for longitudinal barriers. NCHRP 350 remarks that "it is anticipated that safety features qualified for test level 3 will remain acceptable for a wide range of high speed arterial highways." Similarly, NCHRP 244 states: "Test Level 3 would presumably be appropriate for Interstate and U. S. highways since it corresponds closely to the recommendations in Report 230." NCHRP 350 level 3 tests are conducted with a 2000 kg (approximately 4500 lb.) pick-up truck. NCHRP 350 selected a ¾ ton pick-up truck for

level 3 tests in response to the mandate of ISTEA Section 1073, because it was representative of the light duty trucks referenced by the law. The guardrail struck by the bus satisfies the requirements of NCHRP 350 test level 3.

NCHRP 350 includes optional test levels for vehicles larger than 4500 pounds. However, NCHRP 350 does not include any roadside barrier tests for intercity buses.

NCHRP 350, just as NCHRP 230, offers a caveat to its heavy vehicle tests:

> Three heavy test vehicles are included in Table 2.2 along with recommended properties. Although tests have been conducted with each of these vehicles, experience accumulated to date is limited and insufficient to clearly establish appropriateness of these vehicles for testing safety features or to establish well defined specifications for these vehicles.

Selecting a barrier that may "redirect" a 40,000 pound bus striking it at a speed of 50 to 60 miles per hour does not mean such redirection would be achieved without the bus: a) rolling over onto the adjacent traffic lane of I-610 and sliding on its side at 50-60 miles per hour; or b) rolling over the barrier and sliding upside down on the shoulder at 50 to 60 miles per hour. NCHRP 350 points out that crash experience shows that an overturned heavy vehicle usually undergoes a 90 degree roll and slides to a rest on its side. NCHRP 350 allows vehicle rollover in achieving redirection of a commercial test vehicle for Test Levels 4 through 6 because "the primary goal in these tests is to demonstrate that the

longitudinal barrier being evaluated can contain and redirect the vehicle."

Selecting a guardrail that passes NCHRP 350 test levels 4 through 6 would not assure any improvement in safety for the unrestrained passengers of an intercity bus. NCHRP 350 does not provide any criteria or basis for evaluating occupant risks for unrestrained vehicle occupants in testing the crashworthiness of longitudinal barriers. When test dummies are used to simulate occupants, NCHRP 350 requires that they be "restrained with the existing occupant restraint system in the test vehicle." Test dummies are optional for testing heavy vehicles. However, NCHRP 350 provides: "For Test Levels 4 through 6, when a dummy is used, it should be placed in the driver's seat and it should be restrained with the existing restraint system."

The Louisiana Fourth Circuit Court of Appeal's judgment erroneously supplanted federal law with certain "subjective" guardrail design considerations set for in the 1989 Roadside Design Guide – a publication of American Association of State Highway and Transportation Officials (AASHTO) – in deciding that LaDOTD had a tort law duty to provide a guardrail on the interstate highway capable of accommodating a 40,000 pound bus. While the 1989 Roadside Design Guide has been recognized as an authoritative reference guide by FHWA, it certainly does not trump either ISTEA Section 1073 or FHWA's actual approval of the guardrail design.

The following passage from the 1989 Roadside Design Guide concerning "subjective" design considerations – from which the Louisiana Fourth Circuit Court of Appeal distilled the standard of care for interstate highway guardrail designed imposed against LaDOTD – provides in relevant part:

> ... subjective factors most often considered for new construction or safety upgrading include:
>
> • high percentage of heavy vehicles in the traffic stream
>
> • adverse geometrics such as sharp curvature oftentimes combines with short sight distance
>
> • severe consequences associated with penetration of a barrier by a larger vehicle.

Both dissents to the Louisiana Fourth Circuit Court of Appeal's judgment observed that the subjective considerations passage of the 1989 Roadside Design Guide did not rise to the level of a mandatory crashworthiness standard. Judge Gorbaty's dissent offers the following comment:

> Plaintiffs' experts, upon whose testimony the trial court relied, testified that the federal guidelines recommended that states consider installing guardrails sufficiently strong to withstand impact from much heavier vehicles, such as the bus involved in this accident. These guidelines are purely aspirational, and do not require compliance.

In his dissent, Judge Tobias remarks:

> However, in 1989 at the time of the reconstruction of the highway, federal guidelines[4] recommended that states 'consider' installing guardrails capable of redirecting

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[4] 1989 Roadside Design Guide

heavier vehicles. The guidelines did not require the installation of guardrails that would redirect vehicles heavier than an ordinary automobile.

Interestingly, the 1989 Roadside Design Guide did not exist in 1987 when FHWA approved LaDOTD's plans for the guardrail struck by the bus. Instead, the design guide in effect during the 1987 preparation and FHWA approval of the I-610 Rehabilitation Project plans (and continuing until June 25, 1990) was the 1977 AASHTO "Guide for Selecting, Locating and Designing Traffic Barriers ("1977 AASHTO Guide") – which made no mention of those "subjective" criteria. Even if FHWA could have looked into the future when it approved the guardrail plans, its decision to approve the strong-post w-beam guardrail struck by the bus is not subject to disregard or dismissal by the Louisiana Fourth Circuit Court of Appeal.

Notwithstanding the preemption issue, the 1989 Roadside Design Guide does not provide any objective design criteria requiring LaDOTD to provide a roadside barrier for the I-610 overpass of the golf cart path capable of redirecting a 40,000 pound bus. Moreover, the 1989 Roadside Design Guide does not establish any crashworthiness standards for roadside barriers. Instead, it defers to the standard crash tests presented in NCHRP Report 230. It points out that NCHRP Report 230 "recommends two tests on standard sections of longitudinal barriers, one with an 1800 lb. Vehicle impacting at 60 mph and 15° to evaluate occupant risk, and one with a 4500 lb. Vehicle impacting at 60 mph and 25° to evaluate the structural integrity of the barrier." The 1989 Roadside Design Guide

explains: "Traditionally, most roadside barriers were developed, tested and installed with the intention of containing and redirecting passenger vehicles weighing up to 4500 pounds." It also expressly declares that "this guide does not presently include objective warrants for higher performance level barriers." It goes further by acknowledging that: "objective warrants for the use of higher performance traffic barriers do not presently exist."

Furthermore, the 1989 Roadside Design Guide does not in any way suggest that use of a wood strong-post w-beam guardrail as a roadside barrier for the interstate highway system is prohibited. On the contrary, Section 5.4.1.5 of the 1989 Roadside Design Guide begins with the following remark: "Strong post w-beam is the most common barrier system in use today." Also, Section 5.4.1.5 of the 1989 Roadside Design Guide reports that the strong post w-beam guardrail system successfully redirects vehicles in the weight range of NCHRP Report 230's standard crash worthiness tests: "this system will redirect vehicles in the 1800 – 4500 lb. range".

Designing a guardrail system for a particular site on the interstate highway requires consideration and accommodation of competing safety interests. However, the Louisiana Fourth Circuit Court of Appeal evaluated the guardrail design adequacy issue solely from the myopic perspective of the severe consequences associated with penetration of the semi-rigid guardrail by an intercity bus – while dismissing without any critical analysis the severe alternative consequences associated with the bus not penetrating a rigid concrete barrier and either rebounding onto the roadway or rolling over – or

both[5]. This blindfold approach completely disregards the safety interests of other vehicles and their occupants: a) on the adjacent travel lanes; or b) striking the barrier[6]. Multiple deaths and severe injuries may result from a 40,000 pound intercity bus penetrating a roadside barrier; but those same consequences also may occur if that same vehicle ricochets off of a rigid roadside barrier onto the adjacent traffic lanes and rolls over[7]. Moreover, a rebounding intercity bus rolling over on the adjacent traffic lanes presents an added risk of death and severe injuries to the occupants of other vehicles traveling on the highway. Additionally, non-commercial passenger vehicles with a high center of gravity, such as pick-up trucks and sport utility vehicles, are more likely to roll over when striking a rigid roadside barrier. Rollover accidents tend to result in more severe injuries than those which occur when a vehicle remains upright after impact.

FHWA does not have the luxury of ignoring competing safety interests affected by its selection of an acceptable guardrail for use on an interstate highway. FHWA cannot ignore the Congressional

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[5] National Cooperative Highway Research Program Report 244 (NCHRP 244) declares that a rigid barrier can "cause problems when an out-of-control vehicle re-enters a fast-moving traffic stream"; and that there is a "trade-off between minimizing the severity of the initial barrier collision and returning the vehicle to the traffic stream, where it may become involved in another possibly more serious collision"

[6] NCHRP 244 comments that the positive aspects of a rigid concrete barrier "are gained at the expense of a higher chance of rolling small vehicles over and returning out-of-control vehicles into the traffic stream.

[7] For example, one of the Plaintiffs' highway engineer experts, Dr. E. Robert Ehrlich, agreed that a rollover of the bus may have led to side window ejections.

mandate of ISTEA Section 1073 to implement a crashworthiness standard for guardrails which "shall accommodate vans, mini-vans, pickup trucks, and 4-wheel drive vehicles", as well as automobiles – and neither can the Louisiana Fourth Circuit Court of Appeal.

Considering Congress' mandate that design standards for the interstate highway system shall be applied "uniformly throughout all the States"[23 U. S. C. § 109 (b)], this Court is uniquely positioned to resolve whether: ISTEA Section 1073 establishes a federal crashworthiness design standard for guardrails on the interstate highway system; and federal design standards or guidelines for interstate highway guardrails require accommodation of a 40,000 pound intercity bus notwithstanding ISTEA Section 1073. Certainly, resolution of these important questions of federal law should not be left to the Louisiana Fourth Circuit Court of Appeal.

The Louisiana Fourth Circuit Court of Appeal has condemned as inadequately designed for interstate highway safety the most commonly used guardrail type installed on the nation's highways. Both NCHRP 244 and the 1989 Roadside Design Guide confirm that the strong-post w-beam guardrail has been the most commonly used guardrail for the purpose of shielding non-traversable and fixed object hazards which have the potential to cause death or severe injury on impact. NCHRP 244 identified the strong post w-beam guardrail as the most commonly specified system used to shield bridge approaches, embankments and culverts. Unless reviewed and reversed by this Court, the published decision of the Louisiana Fourth Circuit Court of Appeal will serve as precedent for launching future tort action attacks across the country based on design inadequacy of the

strong-post w-beam guardrail for use on the interstate highway system. This Court should seize the opportunity to shut down that opportunity.

VI.
CONCLUSION

An intercity bus engaged in interstate commerce colliding with an interstate highway system guardrail clearly presents safety and legal issues of nationwide concern and consequences. Congress and FHWA have exercised their respective responsibilities and authority to address the safety issues. This Court should now exercise control over the legal issues in furtherance of Congress' objective of applying guardrail safety and design standards for the interstate highway system "uniformly throughout all the States". 23 U. S. C. § 109 (b).

This Court should grant a writ of certiorari to review the judgment of the Louisiana Fourth Circuit Court of Appeal, reverse that judgment, and order the dismissal with prejudice of the demands of the plaintiffs/respondents in the consolidated actions.

Respectfully submitted,
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APPENDIX A

THE SUPREME COURT OF THE STATE OF LOUISIANA

LELIA MARIE TASSIN,
WIFE OF/AND IRVING C.
TASSIN, JR.

VS. NO. 2008-CA-1940

FRANK BENDEL, CUSTOM BUS
CHARTERS, INC., REPRESENTED
BY ITS PRESIDENT, DONNA
BEGOVICH, CASINO MAGIC AND
THE INSURERS OF FRANK BENDEL,
CUSTOM BUS CHARTERS, INC.
AND CASINO MAGICAND ALL
OTHER CONSOLIDATED CASES

IN RE: Louisiana State of; Transportation and Development Department of; Defendant(s); Applying for Writ of Certiorari and/or Review, Parish of Orleans, Civil District Court Div. B, Nos. 99-10369, 99-7764, 99 7936, 99-8086, 99-8097, 99-8133, 99-8403/99-8405, 99--8407/99-8471, 99-8842, 99-9508, 99-11628, 99-13451, 99-17756/2000-7078, 99--7712, 99-10417, 99-7665, 99-7816, 99 8081/99-8087/99-8132, 99-8226, 99-8404, 99-8406, 99-8470, 99-8562, 99-9342, 99-10078, 99-11911, 99-16031, 2000-7026, 2001-5351; to the Court of Appeal, Fourth Circuit, No(s). 2007-CA-1123, 2007-CA-1132, 2007-CA-1142, 2007-CA-1498, 2007-CA-1131, 2007-CA-1133, 2007-

CA-1134, 2007-CA-1135, 2007-CA-1136, 2007-CA-1137, 2007-CA-1138, 2007-CA-1139, 2007-CA-1140, 2007-CA-1141, 2007-CA-1143, 2007-CA-1144, 2007-CA-1145, 2007-CA-1146, 2007-CA-1147, 2007-CA-1148, 2007-CA-1149, 2007-CA-1150, 2007-CA-1151, 2007-CA-1152, 2007-CA-1153, 2007-CA-1154, 2007-CA-1155, 2007-CA-1156, 2007-CA-1119, 2007-CA-1120, 2007-CA-1121, 2007-CA-1122, 2007-CA-1124, 2007-CA-1125, 2007-CA-1126, 2007-CA-1127, 2007-CA-1128, 2007-CA-1129, 2007-CA-1130

November 10, 2008
Denied.

BJJ
PFC
CDK
JTK
JLW

VICTORY, J., would grant.
TRAYLOR, J., would grant.

Supreme Court of Louisiana
November 10, 2008

Katherine A. Fontana
Deputy Clerk of Court
For the Court

APPENDIX B

JUDGMENT OF THE
LOUISIANA FOURTH CIRCUIT
COURT OF APPEAL
[July 9, 2008]

LELIA MARIE TASSIN, WIFE OF/AND IRVING C. TASSIN, JR. *COURT OF APPEAL
*FOURTH CIRCUIT

VERSUS *STATE OF LOUISIANA

FRANK BENDEL
CUSTOM BUS CHARTERS, INC., REPRESENTED BY ITS PRESIDENT, DONNA BEGOVICH, CASINO MAGIC AND THE INSURERS GF FRANK BENDEL, CUSTOM BUS CHARTERS, INC. AND CASINO MAGIC NO. 2007-CA-1119

CONSOLIDATED WITH:

BERNARD WILLLIAMS, INDIVIDUALLY AND ON BEHALF OF THE ESTATE OF HIS MOTHER, JEWEL WILLIAMS, DECEASED; AS WELL AS ON BEHALF OF HIS MINOR SISTER, ORRIGNNE WILLIAMS NO. 2007-CA-1120

VERSUS

CUSTOM BUS CHARTERS, INC., RELIANCE INSURANCE COMPANY, FRANK BEDELL, CASINO MAGIC CORPORATION AND ABC INSURANCE COMPANY (AS INSURER OF CASINO MAGIC)

CONSOLIDATED WITH:

ANTON ZORICK NO. 2007-CA-1121

VERSUS

CUSTOM BUS CHARTERS, INC., RELIANCE INSURANCE COMPANY, FRANK BEDELL, CASINO MAGIC CORPORATION, AND INSURANCE COMPANY (AS INSURER OF CASINO MAGIC)

CONSOLIDATED WITH:

ROBERT TORRES, SR., ROBERT TORRES, JR., BARRY PAUL TORRES AND BRIAN JOSEPH TORRES, INDIVIDUALLY AND ON BEHALF OF THE ESTATE OF EMILY A. TORRES NO. 2007-CA-1122

VERSUS

FRANK BEDELL, CUSTOM BUS CHARTERS, INC., REPRESENTED BY ITS

PRESIDENT, DONNA
BEGOVICH, AND THEIR
INSURANCE COMPANY,
RELIANCE INSURANCE
COMPANY, CASINO MAGIC
CORPORATION AND THE
INSURERS OF CUSTOM BUS
CHARTERS, INC. AND
CASINO MAGIC CORPORATION

CONSOLIDATED WITH:

HILDA MARIA ALEXANDER NO. 2007-CA-1123

VERSUS

FRANK BEDELL, CUSTOM
BUS CHARTERS, INC., ABC
INSURANCE COMPANY,
CASINO MAGIC OF
LOUISIANA CORP. AND XYZ
INSURANCE COMPANY
CONSOLIDATED WITH:

LUCIEN J. GAUFF, JR., NO. 2007-CA-1124
LUCIEN J. GAUFF, III,
CHERMAIN GAUFF GUERIN
AND ERROL M. GAUFF,
INDIVIDUALLY AND ON
BEHALF OF THE ESTATE OF
SHRILEY GAUFF

VERSUS

FRANK BEDELL, CUSTOM
BUS CHARTERS, INC.,

REPRESENTED BY ITS
PRESIDENT, DONNA
BEGOVICH, AND THEIR
INSURANCE COMPANY,
RELIANCE INSURANCE
COMPANY, CASINO MAGIC
CORPORATON AND THE
INSURERS OF CUSTOM BUS
CHARTERS, INC. AND
CASINO MAGIC
CORPORATION

CONSOLIDATED WITH:

GLORIA HOTARD, JUDY LAFONTAINE AND JOSEPH OUBRE, SR., INDIVIDUALLY AND ON BEHALF OF THEIR ESTATE OF HER MOTHER, BELLIE ELFER — NO. 2007-CA-1125

VERSUS

FRANK BEDELL, CUSTOM
BUS CHARTERS, INC.,
REPRESENTED BY ITS
PRESIDENT, DONNA
BEGOVICH, AND THEIR
INSURANCE COMPANY,
RELIANCE INSURANCE
COMPANY, CASINO MAGIC
CORPORATION AND THE
INSURERS OF CUSTOM BUS
CHARTERS, INC. AND
CASINO MAGIC CORPORATION

CONSOLIDATED WITH:

LOIS PONVILLEE, WIFE OF/AND MILTON PONVILLE — NO. 2007-CA-1126

VERSUS

FRANK BEDELL, CUSTOM BUS CHARTERS, INC., REPRESENTED BY ITS PRESIDENT, DONNA BEGOVICH, AND THEIR INSURANCE COMPANY, RELIANCE INSURANCE COMPANY, CASINO MAGIC CORPORATION AND THE INSURERS OF CUSTOM BUS CHARTERS, INC. AND CASINO MAGIC CORPORATION

CONSOLIDATED WITH:

DEBORAH A. SCANLAN, INDIVIDUALLY AND ON BEHALF OF THE ESTATE OF HER MOTHER, DOLLY SPOSITO — NO. 2007-CA-1127

VERSUS

FRANK BEDELL, CUSTOM BUS CHARTERS, INC., REPRESENTED BY ITS PRESIDENT, DONNA BEGOVICH, AND THEIR

INSURANCE COMPANY, RELIANCE INSURANCE COMPANY, CASINO MAGIC CORPORATION AND THE INSURERS OF CUSTOM BUS CHARTERS, INC. AND CASINO MAGIC CORPORATION

CONSOLIDATED WITH:

BARBARA J. GIBSON, AND HER CHILDREN, THOMAS J. BRYANT, PALLIE MILLER EULA ORDOYNE, WILLIAM BRYANT, JR. AND BRENDA SAMROW NO. 2007-CA-1128

VERSUS

FRANK BEDELL, CUSTOM BUS CHARTERS, INC., REPRESENTED BY ITS PRESIDENT, DONNA BEGOVJCH, AND THEIR INSURANCE COMPANY, RELIANCE INSURANCE COMPANY, CASINO MAGIC CORPORATION AND THE INSURERS OF CUSTOM BUS CHARTERS, INC. AND CASINO MAGIC CORPORATION

CONSOLIDATED WITH:

HUBERT REMONDET, JR, NO. 2007-CA-1129

SANDRA REMONDET AND
JOHNNY REMONDET,
INDIVIDUALLY AND ON
BEHALF OF THEIR EST ATE
OF THEIR MOTHER,
MILDRED REMONDET

VERSUS

FRANK BEDELL, CUSTOM
BUS CHARTERS, INC.,
REPRESENTED BY ITS
PRESIDENT, DONNA
BEGOVICH, AND THEIR
INSURANCE COMPANY,
RELIANCE INSURANCE
COMPANY, CASINO MAGIC
CORPORATION AND THE
INSURERS OF CUSTOM BUS
CHARTERS, INC. AND
CASINO MAGIC CORPORATON

CONSOLIDATED WITH:

BARBARA GIBSON NO. 20007-CA-1130

VERSUS

FRANK BENDEL, CUSTOM
BUS CHARTERS, INC.,
REPRESENTED BY ITS
PRESIDENT, DONNA
BEGOVICH, CASINO MAGIC
AND THE INSURERS OF

FRANK BENDEL, CUSTOM
BUS CHARTERS, INC. AND
CASINO MAGIC

CONSOLIDATED WITH:

JOSEPH LABRANCHE, AND HIS SON, CARL LABRANCHE NO. 2007-CA-1131

VERSUS

FRANK BEDELL, CUSTOM
BUS CHARTERS, INC.,
REPRESENTED BY ITS
PRESIDENT, DONNA
BEGOVICH, AND THEIR
INSURANCE COMPANY,
RELIANCE INSURANCE
COMPANY, CASINO MAGIC
CORPORATION AND THE
INSURERS OF CUSTOM BUS
CHARTERS, INC. AND
CASINO MAGIC CORPORATION

CONSOLIDATED WITH:

STACY TASSIN NO. 2007-CA-1132

VERSUS

FRANK BEDELL, CUSTOM
BUS CHARTERS, INC.;
RELIANCE INSURANCE
COMPANY; AND CASINO
MAGIC CORPORATION

CONSOLIDATED WITH:

EARLINE GUERET AND JOSEPH GUERET — NO. 2007-CA-1133

VERSUS

FRANK BEDELL; CUSTOM BUS CHARTERS, INC.; RELIANCE INSURANCE COMPANY AND CASINO MAGIC CORPORATION

CONSOLIDATED WITH:

MARY TOWNSON — NO. 2007-CA-1134

VERSUS

FRANK BEDELL, CUSTOM BUS CHARTERS, INC., RELIANCE INSURANCE COMPANY, AND CASINO MAGIC CORPORATION

CONSOLIDATED WITH:

ALINE GUERET — NO. 2007-CA-1135

VERSUS

FRANK BEDELL, CUSTOM BUS CHARTERS, INC., RELIANCE INSURANCE COMPANY, AND CASINO MAGIC CORPORATION

CONSOLIDATED WITH:

KATHY TASSIN AND GEORGE TASSIN — NO. 2007-CA-1136

VERSUS

FRANK BEDELL, CUSTOM BUS CHARTERS, INC., RELIANCE INSURANCE COMPANY, AND CASINO MAGIC CORPORATION

CONSOLIDATED WITH:

JOAN MARIE GEORGE — NO. 2007-CA-1137

VERSUS

CUSTOM BUS CHARTERS, INC., RELIANCE INSURANCE COMPANY, FRANK BEDELL, CASINO MAGIC CORPORATION, AND HARTFORD INSURANCE COMPANY

CONSOLIDATED WITH:

JOAN MARIE GEORGE, INDIVIDUALLY AND ON BEHALF OF THE ESTATE OF HER MOTHER, CATHERINE OLIVIA HUMPHREYS, DECEASED — NO. 2007-CA-1138

VERSUS

CUSTOM BUS CHARTERS,
INC., RELIANCE INSURANCE
COMPANY, FRANK BEDELL,
JR., CASINO MAGIC
CORPORATION; AND
HARTFORD INSURANCE
COMPANY

CONSOLIDATED WITH:

SANDRA AGEE-MANCUSO, NO. 2007-CA-1139
LORRAINE AGEE-WRIGHT,
MANDY AGEE-WOLF,
JESSEE AGEE AND BETTY
MAE AGEE-DUTTER,
INDIVIDUALLY AND ON
BEHALF OF THE ESTATE OF
THEIR MOTHER, AGNES
IVORY ROSE AGEE,
DECEASED

VERSUS

CUSTOM BUS CHARTERS, INC.,
RELIANCE INSURANCE COMPANY,
FRANK BEDELL,
CASINO MAGIC
CORPORATION AND THE
STATE OF LOUISIANA,
THROUGH THE
DEPARTMENT OF
TRANSPORTATION

CONSOLIDATED WITH:

WILLIAM BRENNER, II, INDIVIDUALLY AND ON BEHALF OF THE ESTATE OF AURORA RIOS — NO. 2007-CA-1140

VERSUS

RELIANCE INSURANCE COMPANY, CUSTOM BUS CHARTERS, INC., FRANK BEDELL, JR., CASINO MAGIC CORPORATION, ABC INSURANCE COMPANY, AND STATE OF LOUISIANA, THROUGH THE DEPARTMENT OF TRANSPORTATION AND DEVELOPMENT

CONSOLIDATED WITH:

DARRELL MATHIEU, SR. AND ROSANA MATHIEU GARNETT — NO. 2007-CA-1141

VERSUS

FRANK M. BEDELL, CUSTOM BUS CHARTERS, INC., RELIANCE INSURANCE COMPANY, CASINO MAGIC CORPORATION AND ABC INSURANCE COMPANY

CONSOLIDATED WITH:

THERESA VICTOR, INDIVIDUALLY AND ON BEHALF OF THE ESTATE OF TIMOTHY VICTOR — NO. 2007-CA-1142

VERSUS

CUSTOM BUS CHARTERS, INC., RELIANCE INSURANCE COMPANY, FRANK BEDELL, CASINO MAGIC CORPORATION, ABC INSURANCE COMPANY (AS INSURER OF CASINO MAGIC CORPORATION), AND STATE OF LOUISIANA, THROUGH THE DEPARTMENT OF TRANSPORTATION

CONSOLIDATED WITH:

DOROTHY BORNE — NO. 2007-CA-1143

VERSUS

FRANK BEDELL, CUSTOM BUS CHARTERS, INC., REPRESENTED BY ITS PRESIDENT, DONNA BEGOVICH, AND THEIR INSURANCE COMPANY, RELIANCE INSURANCE COMPANY, CASINO MAGIC CORPORATION AND THEIR INSURERS, THE TRAVELERS INSURANCE COMPANY AND HARTFORD INSURANCE

COMPANY

CONSOLIDATED WITH:

LAWRENCE LEE COOK NO. 2007-CA-1144

VERSUS

FRANK M. BEDELL, CUSTOM BUS CHARTERS, INC., RELIANCE INSURANCE COMPANY, CASINO MAGIC CORPORATION AND ABC INSURANCE COMPANY

CONSOLIDATED WITH:

JOSEPHINE BRUCE, INDIVIDUALLY AND ON BEHALF OF THE ESTATE OF HER MOTHER, ROSE L. STREVA NO. 2007-CA-1145

VERSUS

CUSTOM BUS CHARTERS, INC., RELIANCE INSURANCE COMPANY, FRANK BEDELL, CASINO MAGIC CORPORATION AND ABC INSURANCE COMPANY

CONSOLIDATED WITH:

PEARL V. BADEAUX NO. 2007-CA-1146

VERSUS

CUSTOM BUS CHARTERS, INC.,
FRANK BEDELL,
RELIANCE INSURANCE
COMPANY, CASINO MAGIC
CORPORATION AND ABC
INSURANCE COMPANY

CONSOLIDATED WITH:

ANNA BELLE STEIN, NO. 2007-CA-1147
ET ALS.

VERSUS

CUSTOM BUS CHARTER,
INC., RELIANCE INSURANCE
COMPANY, FRANK BEDELL,
AND DEPARTMENT OF
TRANSPORTATION

CONSOLIDATED WITH:

MADELINE DEETERS NO. 2007-CA-1148
CAMPAGNA AND ALBERTA
DEETERS BONNIN

VERSUS

THE SUCCESSION OF FRANK
BEDELL, CUSTOM BUS
CHARTERS, INC.,
REPRESENTED BY ITS
PRESIDENT, DONNA
BEGOVICH, AND ITS
INSURANCE COMPANY,

RELIANCE INSURANCE
COMPANY, CASINO MAGIC
CORPORATION, ET AL

CONSOLIDATED WITH:

DON GAUTHIER, NO. 2007-CA-1149

INDIVIDUALLY AND ON
BEHALF OF THE ESTATE OF
HIS MOTHER, RITA
GUILLARD
VERSUS
FRANK BEDELL, JR.;
CUSTOM BUS CHARTERS,
INC., THEIR INSURANCE
COMPANY, RELIANCE
INSURANCE COMPANY;
CASINO MAGIC CORPORATION,
AND ITS INSURER, HARTFORD
INSURANCE COMPANY, THE
STATE OF LOUISIANA
THROUGH THE
DEPARTMENT OF
TRANSPORTATION

CONSOLIDATED WITH:

TIM RICHARD AND NO. 2007-CA-1150
MICHAEL RICHARD

VERSUS

CUSTOM BUS CHARTERS,
RELIANCE INSURANCE
COMPANY, CASINO MAGIC

CONSOLIDATED WITH:

JESSIE AGEE AND CLARENCE AGEE VERSUS

NO. 2007-CA-1151

RELIANCE JNSURANCE COMPANY, CUSTOM BUS CHARTER, INC., AND DEPARTMENT OF TRANSPORTATION AND DEVELOPMENT

CONSOLIDATED WITH:

EDWARD FARRELL

NO. 2007-CA-1152

VERSUS

FRANK BEDELL, CUSTOM BUS CHARTERS, INC., ET AL.

CONSOLIDATED WITH:

DEBORAH JOHNSTON, LINDA JOHNSTON SABER, CARL DOISHER, JIMMIE DOISHER AND ENNIS DOISHER, INDIVIDUALLY AND ON BEHALF OF THE EST A TES OF THEIR RESPECTIVE PARENTS, CALVIN DWIGHT JOHNSTON AND ANNIE DELL DOISHER JOHNSTON

NO. 2007-CA-1153

VERSUS

STATE OF LOUISIANA,
THROUGH THE
DEPARTMENT OF
TRANSPORTATION AND
DEVELOPMENT

CONSOLIDATED WITH:

LORRAINE AGEE WRIGHT, NO. 2007-CA-1154
INDIVIDUALLY AND ON
BEHALF OF THE ESTATE OF
HER MOTHER, AGNES
IVORY ROSE AGEE

VERSUS

RELIANCE INSURANCE
COMPANY, CUSTOM BUS
CHARTERS, INC., ESTATE OF
FRANK BEDELL, MARDI
GRAS CASINO
CORPORATION, TRAVELERS
INSURANCE COMPANY,
HARTFORD INSURANCE
COMPANY, ROYAL
INSURANCE COMPANY, THE
STATE OF LOUISIANA, ET AL.

CONSOLIDATED WITH:

KEITH J. CAMBRE NO. 2007-CA-1155

VERSUS

STATE OF LOUISIANA,
THROUGH THE
DEPARTMENT OF
TRANSPORTATION AND
DEVELOPMENT

CONSOLIDATED WITH:

GLORIA DECHARA NO. 2007-CA-1156

VERSUS

THE STATE OF LOUISIANA,
DEPT. OF TRANSPORTATION
AND DEVELOPMENT, MARDI
GRAS CASINO CORP, D/B/A
CASINO MAGIC, HARTFORD
INSURANCE, ROYAL
INSURANCE COMPANY, AND
TRAVELERS INSURANCE
COMPANY

CONSOLIDATED WITH:

SUSAN GUIDRY AND NO. 2007-CA-1498
NANCY DESSELLE,
INDIVIDUALLY AND ON
BEHALF OF THEIR DECEASED
PARENTS, ARTO MARSE, JR.
AND JUANITA MARSE

VERSUS

MRS. FRANK BEDELL AS
THE SUCCESSION

REPRESENTATIVE OF
FRANK BEDELL, CUSTOM
BUS CHARTERS, INC.,
RELIANCE INSURANCE
COMPANY, Caslon MAGIC
CORPORATION AND ABC
INSURANCE COMPANY

APPEAL FROM
CIVIL DISTRICT COURT, ORLEANS PARISH
NOS. 99-7665, C/W99-7712, C/W 99-7764, C/W 99-7816,C/W 99-7936, C/W 99-8018C/W99-8086 ,C/W 99-8087, C/W 99-8097, C/W 99-8132, C/W 99-8133,C/W 99-8153, C/W 99-8226, C/W 99-8403, C/W 99-8404 ,C/W 99-8405, C/W 99-8406,C/W 99-8407, C/W99-8470, C/W 99-8471, C/W 99-8562, C/W 99-8842C/W99-9342, C/W 99-9508, C/W 99-10078, C/W 99-10369, C/W 99-10417,
C/W 99-11628, C/W 99-11911, C/W 99-13451, C/W 99-13830, C/W 99- 16031, C/W 99-17756, C/W 2000-7026, C/W 20007078, C/W 2000-7195, C/W 2000-12321,C/W2001-5351, C/W 99-13718

DIVISION "B-15"
Honorable Rosemary Ledet, Judge

******

Judge Edwin A. Lombard
******

(Court composed of Judge James F. McKay, Judge Dennis R. Bagneris, Sr, Judge Max N. Tobias, Jr., Judge David S. Gorbaty, Judge Edwin A Lombard.)

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AFFIRMED

The State of Louisiana, through the Department of Transportation and Development ("DOTD"), appeals a Judgment by the trial court finding it fifty percent (50%) at fault in a one-vehicle bus accident. For the following reasons, we affirm the trial court's judgment.

Relevant Facts

This matter arose out of a catastrophic bus accident that occurred on May 9, 1999, leaving twenty-two of the forty-three passengers dead, and twenty-one injured. The accident occurred along Interstate 610 ("I-610") in New Orleans where it runs through the golf course in City Park. The bus was en route to the Casino Magic Casino in Mississippi and was being operated by Frank Bedell ("Mr. Bedell"). According to eye witness testimony, for unknown reasons, the bus gradually veered to the right, left the roadway and broke through a guardrail at a speed of 50-60 miles per hour. The bus then went airborne over a ravine and a golf path, and ultimately crashed into the opposite bank of the ravine, crushing the front of the bus upon impact, and causing the center of the bus to crumple.

I-610, at the location where the accident occurred, was originally constructed by DOTD in 1971 and underwent major reconstruction in 1989. During the design phase of the reconstruction project, in 1987 and 1988, DOTD's design plans clearly indicated that the golf cart path was an "area of concern." The design also included a breakaway

guardrail system at the location that was intended to redirect a typical 4,500 pound vehicle. The bus involved in this accident weighed an estimated 35,000 pounds.

Plaintiffs brought suit against Mr. Bedell, Custom Bus Charters, Inc., Casino Magic, and their respective insurers, as well as DOTD. Thirty-eight lawsuits were consolidated for purposes of trial. The liability and damages aspects of the case were bifurcated. The liability portion of the case was tried without a jury. At trial, Plaintiffs' expert witnesses testified that the wood strong-post w-beam guardrail was undersized and some of its posts were termite-infested making it totally inadequate to redirect the 35,000-40,000 pound bus. Plaintiffs' experts further testified that federal guidelines at the time of the reconstruction of the highway recommended that states consider installing guardrails capable of redirecting much heavier vehicles, such as the bus in question. Plaintiffs' experts opined that a proper guardrail or barrier could have prevented the accident and the deaths and injuries that occurred.

DOTD's experts testified that federal regulations at the time of the accident did not require that the guardrail be capable of redirecting a 35,000-40,000 pound bus and disputed Plaintiffs' expert's opinion that a more crashworthy guardrail would have redirected the bus and prevented the accident. DOTD's experts testified that the guardrail performed its intended function exactly as it was designed to do – by breaking away on impact. DOTD further alleged that Mr. Bedell was solely liable for the accident since he did nothing to try to regain control of the bus, or to stop or slow down after leaving the travel lanes.

After the bench trial on the issue of liability, the trial court found that DOTD was 50% at fault and that Mr. Bedell was 50% at fault in causing the Plaintiffs' injuries. In its reasons for judgment, the court stated that it was not convinced that the termite damage caused the guardrail to break; however, it did find that the guardrail was inadequate. The Court also found that DOTD had actual or constructive notice of the guardrail's inadequacy, in light of the fact that the 1989 Roadside Design Guide clearly advised state agencies to consider the risk of harm if large vehicles penetrated a guardrail such as this one. The court specifically found that DOTD knew or should have recognized the serious risk of harm associated with a guardrail system designed only to redirect cars, and not heavier vehicles, and that DOTD's negligent conduct created an unreasonable risk of harm, not only for motorists on this stretch of the highway, but also for those using the golf cart path below the highway. DOTD subsequently filed a motion for new trial. The trial court denied DOTD's motion for new trial, but granted its motion to amend the judgment to reflect that it is a final judgment. DOTD then filed this timely appeal.

Assignments of Error

On appeal, DOTD argues that the trial court erred in:

(1) finding DOTD at fault and liable for the accident;
(2) finding that DOTD's negligence constituted an unreasonable risk of harm;
(3) finding that DOTD had a duty to provide a roadside barrier capable of redirecting the bus;

(4) relying on subjective factors for optional roadside barrier enhancement
(5) relying on the unsubstantiated, plainly wrong, and manifestly erroneous opinions of the Plaintiffs' highway engineering expert in finding DOTD liable, negligent, and at fault;
(6) finding that DOTD knew or should have recognized prior to the accident that the guardrail was inadequate and created an unreasonable risk of harm;
(7) by apportioning fault equally between DOTD and the bus driver; and
(8) by not finding the bus driver solely at fault for the accident

Discussion

Standard of Review

It is well settled that a court of appeal may not set aside a trial court's finding of fact in the absence of manifest error or unless it is clearly wrong. *Rosell v. ESCO*, 549 So. 2d 840, 844 (La. 1989). Factual issues, including the breach of a duty, cause in fact, scope of protection and allocation of fault are all factual issues subject to the manifest error standard described above. See, e.g., *Snearl v. Mercer*, 99-1738, p.11 (La. App. 1 Cir. 2/16/01), 780 So. 2d 563, 574. Thus, if the trial court's findings are reasonable in light of the record reviewed in its entirety, the court of appeal may not reverse, even though it is convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently. *Rosell*, at 844.

Liability

Plaintiffs have alleged that DOTD is liable under theories of strict liability and negligence for defective design, condition, and maintenance of the guardrail. In determining whether liability exists under a negligence theory, courts employ a duty risk analysis in which the following must be considered: (1) whether the conduct of which the plaintiff complains was a cause-in-fact of the harm; (2) whether there was a duty on the part of the defendant which was imposed to protect against the risk involved; (3) whether there was a breach of that duty; and (4) damages. *Blair v. Tynes*, 92-3294 (La. 1993), 621 So. 2d 591, 595. Further, under a strict liability theory, pursuant to Louisiana Revised Statute §9:2800, and as applied to government defendants like DOTD, Plaintiffs must also prove that DOTD had actual or constructive notice of the vice or defect which caused the damage prior to the occurrence, that DOTD had a reasonable opportunity to remedy the defect, and that it failed to do so. La. Rev. Stat. §9:2800.

Louisiana law imposes a duty on DOTD to design, construct, and maintain Louisiana's highways. To further this end, Louisiana Revised Statute§48:35(A) requires DOTD to "adopt minimum safety standards with respect to highway and bridge design, construction, and maintenance." The statute further mandates that these standards "correlate with and, so far as possible, conform to the system then current, as approved by the American Association of State Highway and Transportation Officials [AASHTO]"' La. Rev. Stat. §48.35(A). These design standards are known as the Roadside Design Guide.

DOTD has a legal duty to maintain the highways in a reasonably safe condition. *Sinitiere v.*

Lavergne, 391 So. 2d 821, 824 (La. 1980). This duty "extends to the protection of those people who may be foreseeably placed in danger by an unreasonably dangerous condition." Id. at 825. It extends not only to prudent and attentive drivers, but also to motorists who are slightly exceeding the speed limit or momentarily inattentive. *Trahan v. State, Dep't of Transp. & Dev* 536 So. 2d 1269, 1273 (La. App. 3 Cir. 1988). DOTD must also maintain the shoulders and the area off the shoulders, within its right-of-way, in such a condition that they do not present an unreasonable risk of harm to motorists using the adjacent roadway and to others, such as pedestrians, who are using the area in a reasonably prudent manner. *Netecke v. State ex. rel. Dep't. of Transp. & Dev.*, 98-1182, 98-1197, p.8 (La. 10119/99), 747 So 2d 489, 495. DOTD's duty to maintain safe shoulders encompasses the foreseeable risk that for any number of reasons a motorist might find himself on, or partially on, the shoulder Id.

DOTD cannot knowingly allow a condition to exist that is a hazard to a reasonably prudent driver. *Rosen v State, Dep't of Transp & Dev*, 01-0499, p. 11 (La. App. 4 Cir. 1/30/02), 809 So. 2d 498, 507. In such a case, DOTD must take reasonable measures to eliminate or reduce the risks associated with the dangerous condition or may warn the public of the danger, risk, or hazard involved. Id. Clearly, then, under the foregoing Louisiana law, DOTD had a statutory duty to the Plaintiffs to design, construct and maintain, in a reasonably safe condition, the area along 1-610 where the accident occurred.

Whether DOTD breached its duty, that is, whether the roadway at the scene of this accident was an unreasonably dangerous condition will depend on the particular facts and circumstances of

this case. See, *Hunter v. Dep't. Transp. & Dev.*, 93-0235 (La. 7/01/93), 620 So. 2d 1149, 1151; see also, *Netecke*, 98-1182, 98-1197 at pp. 7-9; 747 So. 2d at 494-95. However, DOTD cannot escape liability by simply showing that highway met the existing standards. *Rosen*, 01-0499, p.11, citing, *Aucoin v. State, Dep't of Transp. & Dev*, 97-1938, 97 -1967, pp 6-8 (La.4/24/98), 712 So. 2d 62, 66-67. As the trial court correctly pointed out, design standards both at the time of original construction and at the time of the accident may be relevant factors in determining whether a given stretch of roadway presents an unreasonable risk of harm, but are not determinative of the issue. *Dill v. State, Dep't of Transp. & Dev*, 545 So. 2d 994, 996 (La. 1989). Although DOTD does not have a duty to bring old highways up to modern AASHTO standards absent a major reconstruction of that highway (See: *Cormier v. Comeaux*, 98-2378 p. 9, 748 So. 2d 1123, 1129), whether DOTD has conformed to those standards is a relevant factor in determining the ultimate issue of whether the roadway is unreasonably dangerous. *Aucoin*, 97-1938, 97-1967 at 7,712 So. 2d at 66.

At trial, there was no dispute that DOTD owed a duty to maintain the safety of I-610. There was also no dispute that the area where the golf cart path ran directly under the highway created an "area of concern" for DOTD during the design stage of the reconstruction of the interstate system. In fact, DOTD's expert, Mr. Robertson, admitted that the golf cart path was a nontransversable hazard, but was kept in its location due to a perceived need for the golfers to travel from the clubhouse to the golf course.

However, on the issue of whether DOTD breached its duty and whether I-610, at the precise location where the accident occurred, was unreasonably dangerous, the experts offered conflicting testimony. Plaintiffs' expert, Arthur Barrow, testified that the guardrail at issue was inadequate and not appropriate for an area of concern such as this one. Mr. Barrow opined that, in light of the fact that this area was an "area of concern," the state should have either installed a stronger barrier or made adjustments to the golf cart path to alleviate the danger of penetration of the barrier by a heavy vehicle. Plaintiffs' other two experts, Drs. Ric Robinette and Robert Erlich, testified that the intended purpose of the guardrail was to protect vehicles from going off the highway and onto the golf cart path. Dr. Robinette further testified that had the guardrail performed as it was intended to, the bus would not have left the roadway and crashed into the ravine that contained the golf path; rather, the bus would have either been redirected by the barrier and the accident prevented or, at worst, the bus would have spun around and "flopped over" resulting in a much less catastrophic accident.

DOTD's experts countered the Plaintiffs' evidence with testimony that the bus hit the very end of the guardrail, that the guardrail performed exactly as it should have, that the crashworthiness of the guardrail complied with federal guidelines, and that the driver was solely at fault for the accident since he failed to maintain the vehicle.

Where the testimony of expert witnesses differs, the trier of fact has the responsibility to determine which evidence is the most credible. *Schiro v. State ex rel. Dep't. of Transp. &*

Development, 99-2754, p.12 (La. App, 4 Cir. 3/21101), 808 So. 2d 500, 508, citing *Sistler v. Liberty Mutual insurance Company*, 558 So. 2d 1106, 1111 (La, 1990). Credibility determinations are subject to the strictest deference, and the manifest error standard demands great deference to the trier of fact's findings. Id. citing *Theriot v. Lasseigne*, 93-2661 (La, 715194), 640 So. 2d 1305, 1313. Where conflicting evidence is present, the trial court's reasonable evaluations of credibility and inferences of fact should not be disturbed on appeal unless clearly wrong. *Rosen v. State, Dep't. Transp & Dev*, 01-0499, p. 13 (La. App. 4 Cir. 1/30/02), 809 So, 2d 498, 509.

The trial court heard and weighed all of the expert testimony and concluded that DOTD was liable to the Plaintiffs, The trial court found the testimony of Plaintiffs' experts to be more credible and, in fact, discredited much of DOTD's experts' testimony because it was "not supported by sound methodology and is outweighed by other factual and expert testimony." In its reasons for judgment, the trial court found that the guardrail, at this area of concern, was unreasonably dangerous, inadequate, and played a physical role in causing the accident. The court also found that, because the 1988 Roadside Guide listed criteria for subjective consideration that recommended a stronger guardrail for areas with nontransversable hazards, and the 1989 Guide discussed the fact that some state agencies had developed and used barrier systems capable of redirecting vehicles as heavy as 80,000 pounds, DOTD knew or should have recognized the risk of serious harm associated with a guardrail system designed only to redirect vehicles

no heavier than a typical car along 1-610 where the accident occurred.

After reviewing the record, we find that the evidence supports a finding that DOTD had a duty to the passengers on the bus, that it breached that duty by failing to provide an adequate guardrail, that the risk that a bus would veer off the road and collide with the guardrail was within the scope of the protection afforded by the duty, and that DOTD's breach of the duty was a cause-in-fact of the accident. Clearly, DOTD's conduct in failing to design, install, and, possibly, properly maintain, an adequate guardrail at this location was a factor in causing the injuries and deaths of the bus passengers. As the record discloses a reasonable factual basis for the trial court's findings regarding liability, we cannot say that the trial court was clearly wrong in holding that DOTD is liable for the accident.

Allocation of Fault

Having upheld the trial court's findings of liability, we next address whether the trial court was clearly wrong in allocating fault equally between the parties. In *Watson v. State Farm Fire and Casualty Insurance Co.*, 469 So. 2d 967 (La 1985), the Louisiana Supreme Court set forth five factors to be considered in apportioning fault: (1) whether the conduct resulted from inadvertence or involved an awareness of the danger; (2) the extent of the risk created by the conduct; (3) the significance of what was sought by the conduct; (4) the capacities of the actor, whether superior or inferior; and (5) any extenuating circumstances that might require the actor to proceed without proper care. *Watson*, at 974. Furthermore, the relationship between the

fault/negligent conduct and the harm to the plaintiff(s) are considerations in determining the relative fault of the parties. *Snearl v. Mercer*, 99-1738, p. 26 (La. App. 1 Cir. 2/16/01), 780 So. 2d 563, 583, citing *Mart v Hill*, 505 So. 2d 1120, 1123 (La.1987).

DOTD argues that the trial court erred in allocating 50% fault to the driver of the bus and 50% to the DOTD. DOTD argues that it was not at fault in causing the accident since the guardrail was adequate and appropriate for the area in which the accident occurred. The DOTD claims that the trial court should have found Mr. Bedell solely at fault for the accident, since he veered off the road, onto the shoulder, and rather than applying his brakes, sped down the shoulder, through the guardrail and over the ravine. It argues that Mr. Bedell did nothing to try to regain control of the bus, or to stop or slow down after leaving the travel lanes, and that his failure to do so was the sole cause-in-fact of the accident.

Conversely, Plaintiffs argue that the design of the entire stretch of I-610 where the accident occurred was inherently dangerous, and that trial court's allocation of fault is both correct and in line with similar cases involving one vehicle accidents We have thoroughly reviewed the case law on this issue and cannot say that the trial court's allocation of 50% fault to DOTD and 50% to Mr. Bedell was unreasonable under the facts of this case.

In *Campbell v. Louisiana Dept. of Transp. & Dev*, 94-1052 (La. 1/17/95), 648 So. 2d 898, for example, a single-car accident occurred when the driver fell asleep at the wheel and his automobile struck a bridge abutment, resulting in the death of a passenger and injuries to the driver and another

passenger. Following a bench trial, the trial court found the driver 25% at fault and the DOTD 75% at fault for causing the accident and resulting injuries. On appeal, this court amended the judgment to reduce the liability of the DOT from 75% to 10%. The Louisiana Supreme Court reversed and reinstated the trial court judgment. In doing so, the court analyzed the fault of the parties in causing the harm to the plaintiffs, finding it clear that the greater degree of fault lied with the DOTD under the circumstances of that case. The court stated:

> [E]xcept to the extent that the driver's negligence set the accident in motion, the driver had no control over the resulting harm caused by the impact of the vehicle with the concrete bridge abutment. The evidence presented by experts on both sides was that the purpose of a guardrail is to prevent or at least reduce the injuries and subsequent damage by redirecting a vehicle back onto the highway and to prevent impact with the concrete bridge abutment "To put it another way, [the driver's] negligence set the course for an accident to happen, but the harm or injuries to the guest passengers in [the driver's] vehicle were a direct result of the impact with the concrete bridge abutment. We agree with the trial judge's finding that the DOTD's fault is more substantial than the fault of [the driver] in causing the harm sustained. Id. at 902-903.

Similarly, in *Petre v. State ex. rel. Dep't. of Transp. & Dev*, 01-0876 (La. 4/3/02), 817 So. 2d 1107, the Louisiana Supreme Court upheld the trial court's judgment allocating fault equally between an intoxicated driver and the DOTD. In Petre, the

driver momentarily took her eyes off the road and the wheels of her car left the paved surface, She then attempted to turn the wheels to reenter the highway, but failed to apply the brakes and traveled along a ditch until she hit a culvert, She collided with a driveway which ran perpendicular to the culvert and her car became airborne, bounced off two trees, overturned, and finally came to rest on a stump, The Court held that although the driver's intoxication or inadvertence caused her to drive off the road, expert testimony indicated that it was the unreasonably dangerous shoulder and slope of the adjacent ditch that prevented her from reentering the road and which caused the vehicle to become airborne and overturn. Therefore, the Court found that the trial court's allocation of 50% of the fault to DOTD was not manifestly erroneous and upheld the trial court's Judgment.

Likewise, in *Updegraff v. State, Dep't. of Transp. & Dev.*, 01-1048 (La. App. 4 Cir. 10/2/02), 828 So. 2d 693, this court reallocated the percentages of fault for the accident in the amount of 60% to DOTD, and 40% to the driver, who veered off the highway, hit a rut, drove into a drainage ditch, and while attempting to reenter the highway, overcompensated, and ultimately shot across the highway and collided with a tree The evidence showed that the driver, who admitted to consuming alcohol, marijuana, and prescription opiates on the day of the accident, had kept her foot on the accelerator and had failed to apply the brakes at any time after her vehicle left the road. Nevertheless, after reviewing the entire record, we found that the rut in the highway presented an unreasonable risk of harm, and, as a result, the majority of fault was

with DOTD, even though the driver's actions contributed to the accident and her injuries.

Finally, in *Snear v. Mercer*, supra, 99-1738 (La. App. 1 Cir. 2/16/01), 780 So. 2d 563, the First Circuit Court of Appeal reallocated the fault of the driver of the vehicle to 35% and to DOTD to 65% in a one-car accident in which the inattentive driver lost control of his truck, which vaulted over a bridge railing and fell thirty feet, resulting in the death of one of his passengers and causing severe injuries to the other passenger. In that case, the court found that the driver's inattentiveness clearly set the accident in motion; but it also found that the unreasonably dangerous bridge railing failed in its intended purpose of containing vehicles on the roadway and was a substantial cause of the plaintiffs' injuries.

Like the actions of the drivers in the aforementioned cases, Mr. Bedell's negligence clearly set the accident in motion. Mr. Bedell, like all drivers, had a duty to operate the bus in a prudent manner, which included the duty to maintain control of the vehicle and remain within his lane of travel. *Updegraff*, 828 So. 2d at 702. He breached this duty by running off the road and failing to maintain control of the bus. Even so, Mr. Bedell's failure to maintain control of the bus did not relieve DOTD of its duty to keep highways reasonably safe. DOTD was aware that this stretch of I-610 and its proximity to the golf cart path was an "area of concern" Its own expert testified that it was foreseeable that vehicles would run off the road at that location and that the purpose of the guardrail was to redirect vehicles and prevent impact with obstacles. Moreover, the 1989 Roadside Design Guide suggested that states consider installing

guardrails capable of redirecting much heavier vehicles, like the bus involved in this accident. Despite being armed with this information, DOTD chose to install a guardrail capable of redirecting only a normal sized automobile, even though it was foreseeable that heavier vehicles, such as busses and tractor trailers, would run off the road and through the guardrail at this location.

At the appeal hearing, DOTD correctly pointed out that "but for" Mr. Bedell's conduct in losing control of the bus, this accident would not have happened. Although this may be true, our concern in determining whether the trial court's apportionment of fault was reasonable is not which party's conduct initially caused the accident, but how much each party's conduct resulted in the Plaintiffs' ultimate Injuries. We find that the negligence of Mr. Bedell in losing control of the bus combined with DOTD's failure to design, install, and properly maintain a safety system capable of redirecting the bus, equally caused the harm to the passengers on the bus. Except to the extent that Mr. Bedell's negligence set the accident in motion, he had no control over the resulting harm caused by the impact of the bus with the embankment, which crushed the bus like an accordion, resulting in the deaths and serious injuries of the bus passengers. Had the design of the entire area and, specifically, the guardrail itself, been adequate for its intended purpose of redirecting vehicles that veer of the highway, the Plaintiffs' injuries could have been avoided or may have been much less severe.

"In apportioning fault the trier of fact shall consider both the nature of the conduct of each party at fault and the extent of the causal relation between the conduct and the damages claimed." *Campbell,*

94-1052, p. 7 (La. 1/17/95), 648 So. 2d 898, 902 (citing *Watson v. State Farm Fire and Cas. Ins. Co.*, 469 So. 2d 967, 974 (La. 1985). The trier of fact is owed great deference in its allocation of fault. *Schiro*, 99-2754, p .15 (La. App. 4 Cir. 3/21/01), 808 So. 2d 500, 510. "Even if the reviewing court would have decided the case differently had it been the original trier of fact, the trial court's judgment should be affirmed unless manifestly erroneous or clearly wrong." Id., citing *Dupree v. City of New Orleans*, 99-3651 (La. 8/31/00), 765 So. 2d 1002.

Here, the Plaintiffs presented ample evidence, including the testimony of several expert witnesses, to support their claim that DOTD should bear at least half of the fault for the accident that resulted in the injuries and deaths of the forty-three bus passengers. We find that the trial court's fault allocation took into account the nature of Mr. Bedell's conduct as well as that of DOTD, and was consistent with similar Louisiana cases regarding fault allocation. Therefore, the trial court's equal allocation of fault is supported by the law and evidence, and thus, is not manifestly erroneous or clearly wrong.

Conclusion

We have carefully reviewed the record and have found no error in the trial court's finding that the conduct of both the State and Mr. Bedell were at fault in causing this catastrophic accident. Likewise, our review of the record reveals no error in the trial court's allocation of fault between the State and Mr. Bedell. The judgment of the trial court on the liability portion of the bifurcated trial is affirmed.

The State of Louisiana, through the Department of Transportation and Development, is cast with all costs of this appeal. The case is remanded to the district court for trial of the second of the bifurcated phase – the damages suffered by the Plaintiffs.

AFFIRMED

TOBIAS, J., DISSENTS IN PART AND ASSIGNS REASONS.

I respectfully dissent from the majority's affirmation of the trial court's assessment of fifty percent of the fault of the subject accident to the State of Louisiana Department of Transportation and Development.

I agree with the majority that the construction of the barriers combined with the ravine created an unreasonable risk of harm. However, in 1989 at the time of the reconstruction of the highway, federal guidelines[1] recommended that states "consider" installing guardrails capable of redirecting heavier vehicles. The guidelines did not require the installation of guardrails that would redirect vehicles heavier than an ordinary automobile.

The majority's reliance on Campbell v. Louisiana Tramp. & Dev, 94-1052 (La. 1/17/95), 648 So. 2d 898, is misplaced. I find that a substantial difference exists between a rigid unforgiving concrete barrier at a bridge abutment, which does not give upon being struck (such as that which

[1] 1989 Roadside Design Guide

Campbell collided with), and wooden barricades designed to redirect vehicles back onto a highway.[2]

I find that state bears some responsibility based upon the design of the ravine.[3] That ravine could have been designed so that a vehicle leaving the highway would roll up the ravine rather than coming to an abrupt stop. In view of the totality of the facts, especially Mr. Bedell's health and medications, I find that the highest percentage of fault that a reasonable trier of fact could assign to the state for the subject accident is ten percent. The assessment of fault to the state of fifty percent is manifestly erroneous and must be reversed as a matter of law.

Further, this case illustrates why the issue of liability should not be bifurcated from the question of damages. Under La. C.C. Arts. 2315 and 2323, the trier of fact is obligated to determine which damages were caused by which person. To say that all plaintiffs sustained injuries due to the 50% fault of the state is premature. That is, depending upon where each decedent or injured patty sat in the bus, whether the passenger wore a seat belt, and whether injuries were due to being thrown through the windshield, hitting the back of a passenger seat, or from the bus's rolling over, differs from injured party to injured party. Without knowing each injured

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[2] Campbell is thus substantially similar to this court's decision in Rosen v. State Dep't of Transp. & Dev. 01-0499 (La. App. 4 Cir 1/30/02), 809 So 2d 498.

[3] The ravine was designed such that if struck by an errant vehicle that has become totally or partially airborne after hitting one or more of the barricades, the errant vehicle would come to a sudden, abrupt, and immediate stop upon hitting the embankment.

party's injuries, it appears foolhardy to say that conclusively 50% was due to the fault of the state.

In light of the foregoing, I find the majority's assessment of the costs of the appeal to the state erroneous. Costs for the appeal should be borne by the plaintiffs.

GORBATY, J., Dissents WITH REASONS.

Because I find that the bus driver's negligence was the sole cause of the accident in question, I respectfully dissent.

The majority states that the DOTD had a statutory duty to design, construct and maintain, in a reasonably safe condition, the area along the I-610 where the accident occurred, I agree, I disagree, however, that the DOTD breached that duty by failing to install a stronger barrier to prevent penetration by a vehicle heavier than 4500 pounds. Louisiana law requires the DOTD to "adopt minimum safety standards with respect to highway and bridge design, construction and maintenance." La. RS 48:35A. The record supports that these minimum standards were met to recover damages, plaintiffs must prove that 1) the DOTD had custody and control of the thing causing plaintiffs' injuries, 2) the thing was defective because it had a condition which created an unreasonable risk of harm, 3) the DOTD had actual or constructive notice of the defect and failed to take corrective measures within a reasonable time, and 4) the defect was a cause-in-fact of plaintiffs injuries. Cormier v, Comeaux, 98-2378, pp 5-6 (La. 7/7/99), 748 So.2d 1123, 1127; Brown v. Louisiana Indem. Co, 97-1344, p. 3 (La.

3/4/98), 707 So.2d 1240, 1242. Each element of the analysis must be proved.

Plaintiffs' experts, upon whose testimony the trial court relied, testified that the federal guidelines recommended that states consider installing guardrails sufficiently strong to withstand impact from much heavier vehicles, such as the bus involved in this accident. These guidelines are purely aspirational, and do not require compliance. Thus, by complying with the AASHTO standards, the DOTD fulfilled its duty to design, construct and maintain that area of the highway, and specifically, the guardrail, in a reasonably safe condition.

Plaintiffs' experts also testified that had a sturdier guardrail been in place the accident may have been prevented, or, at the very least, it would not have been as severe. Clearly, the guardrail would not have prevented this accident. Indeed, Drs. Robinette and Erlich testified that a stronger guardrail would have prevented the bus from entering the ravine, but would not have prevented the accident. Rather, they testified that instead of entering the ravine the bus would have either careened back into the heavily traveled lanes of traffic, or spun around and "flopped over." Thus, in my opinion, whether or not a stronger guardrail would have lessened the severity of the accident is sheer speculation. Speculation should not enter into the analysis of whether a party is at fault.

The trial court heard testimony that, for unknown reasons, the bus gradually veered to the right, left the roadway, and crashed through the guardrail at a speed of 50-60 miles per hour. It found the bus driver to be 50% liable for the accident. Although the trial court did not find that alleged termite damage to the guardrail caused it to be

defective, it did find that the guardrail was inadequate. As stated herein, this finding was based solely on speculations presented by plaintiffs' experts, and totally ignored the record evidence that the DOTD was in compliance with all state and federal regulations.

I do not find that plaintiffs' have proved any of the elements necessary to hold the DOTD liable for their injuries, The guardrail was in the custody of the DOTD, however, it was not proven that the guardrail caused the damages. There was no proof that the guardrail was defective or presented an unreasonable risk of harm because the guardrail was in compliance with the relevant regulations. The DOTD did not have notice of a defect, because as stated above, there was no defect. Lastly, it was not proven that guardrail caused the injuries. The record contains only speculative testimony about how a better guardrail could have changed the result of the bus driver losing control of the bus. Accordingly, it is my opinion that but for the negligence of the bus driver, this accident would not have occurred. To hold the DOTD 50% liable for this accident, knowing that the DOTD was in compliance with at least the minimum required standards, is manifestly erroneous.

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No. —

Supreme Court, U.S.
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In The Supreme Court of the United States

STATE OF LOUISIANA, THROUGH THE
LOUISIANA DEPARTMENT OF TRANSPORTATION
AND DEVELOPMENT,
Petitioner,

v.

LELIA MARIE TASSIN, WIFE OF/AND
IRVING C. TASSIN, JR., ET AL.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE LOUISIANA
FOURTH CIRCUIT COURT OF APPEAL

SUPPLEMENTAL APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

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CIVIL DISTRICT COURT
FOR THE PARISH OF ORLEANS
STATE OF LOUISIANA

CASE NO. 99-7665 DIVISION "B"
c/w all cases SECTION 15

LEILA MARIE TASSIN, WIFE OF/AND IRVING C. TASSIN, JR.
VERSUS
FRANK BEDELL, CUSTOM BUS CHARTERS, INC., REPRESENTED BY ITS PRESIDENT, DONNA BEGOVICH, CASINO MAGIC AND THE INSURERS OF FRANK BEDELL, CUSTOM BUS CHARTERS, INC., AND CASINO MAGIC

JUDGMENT

The motion of the defendant, the State of Louisiana, through the Department of Transportation and Development, for a new trial pursuant to La.C.C.P. art. 1971 and/or alternatively to amend judgment pursuant to La. C. C. P. art. 1951 came for hearing before this Honorable Court on Tuesday, March 27, 2007.

After considering the memorandum of counsel, oral argument, and review of the applicable law:

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the Motion for New Trial filed by DOTD is DENIED.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Motion to Amend Judgment is GRANTED;

THUS, the Court renders the following Partial Final Judgment:

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that after a bifurcated trial solely addressing the issue of liability, pursuant to LSA-

C.C.P. art. 1915(5) and based on the evidence presented at trial on August 22, 23, 24, 25, September 14, and 15, Octob er 9, 10, 11, 23, 24, November 13 and 14, 2006 Judgment is entered in favor of plaintiffs in the above-captioned matter and against DOTD as to liability for the incident of May 9, 1999, which accident forms the subject matter of the above-referenced consolidated cases.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that liability is apportioned as follows: 50% fault is allocated to DOTD, 50% fault is allocated to Frank Bedell, operator of the bus involved in the May 9, 1999 incident.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that DOTD is hereby ordered to pay 50% of costs of this proceeding, to be determined at a hearing to set costs on May 23, 2007 at 10:00 a.m. and after which an amended judgment shall be issued specifying the dollar amount of same.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the State of Louisiana, through the Department of Transportation and Development shall pay judicial interest on any damages verdicts which shall be rendered in an amount consistent with LSA-R.S. 13:5112(c).

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that pursuant to LSA-C.C.art. 1915(C), should an appeal be taken from this judgment, this trial court shall retain jurisdiction to adjudicate the remaining issues in this case.

SO ORDERED, IN NEW ORLEANS, LOUISIANA THIS 27th DAY OF APRIL, 2007.

S/ Rosemary Ledet
ROSEMARY LEDET
JUDGE

CIVIL DISTRICT COURT
FOR THE PARISH OF ORLEANS
STATE OF LOUISIANA

CASE NO.99-7665 DIVISION "B"
c/w SECTION 15

99-7712	99-7764	99-7816	99-7936
99-8081	99-8086	99-8087	99-8097
99-8132	99-8133	99-8226	99-8403
99-8404	99-8405	99-8406	99-8407
99-8470	99-8471	99-8562	99-8842
99- 9342	99-9508	99-10078	99-10369
99-10417	99-11628	99-11911	99-13451
99-16031	99-17756	2000-7026	2000-7078
2000-5351			

LEILA MARIE TASSIN, WIFE OF/AND
IRVING C. TASSIN, JR.
VERSUS
FRANK BEDELL, CUSTOM BUS
CHARTERS,INC.,REPRESENTED BY ITS
PRESIDENT,DONNA BeGOVICH,CASINO
MAGIC AND THE INSURERS OF FRANK
BEDELLCUSTOM BUS CHARTERS, INC. AND
CASINO MAGIC

JUDGMENT

The above consolidated matters came for trial on the merits on August 22, 23, 24, 25, September 14, 15, October 9, 10, 11, 23, 24, November 13 and 14, 2006.

Considering the stipulations, testimony,

exhibits, and for reasons assigned herein,

IT IS ORDERED, ADJUDGED, AND DECREED that there be judgment in favor of plaintiffs in the above-consolidated cases against the State of Louisiana, Department of Transportation and Development as to liability for the accident of May 9, 1999.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that liability is apportioned equally, fifty percent (50%) each, between the bus operator Frank Bedell and defendant, State of Louisiana, Department of Transportation and Development.

FURTHER, defendant, State of Louisiana through the Department of Transportation and Development, shall pay fifty percent (50%) of costs of the proceedings on liability.

IT IS FURTHER ORDERED that counsel for all parties appear on Tuesday, March 27, 2007, at 10:00 a.m. for the selection of a trial date and scheduling order on the issue of damages.

Judgment Rendered and Signed, February 6, 2007.

S/ Rosemary Ledet
ROSEMARY LEDET
JUDGE

CIVIL DISTRICT COURT
FOR THE PARISH OF ORLEANS
STATE OF LOUISIANA

CASE NO. 99-7665 DIVISION "B"
c/w SECTION 15

99-7712	99-7764	99-7816	99-7936
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LEILA MARIE TASSIN, WIFE OF/AND
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VERSUS
FRANK BEDELL, CUSTOM BUS CHARTERS, INC.,REPRESENTED BY ITS PRESIDENT, DONNA BeGOVICH,CASINO MAGIC AND THE INSURERS OF FRANK BEDELL CUSTOM BUS CHARTERS, INC. AND CASINO MAGIC

Reasons for Judgment

This case arises from a one vehicle accident on Mother's Day, May 9, 1999 involving a tour bus owned by Custom Bus Charters, Inc. ("Custom Bus") and operated by its employee, Frank Bedell. The bus left LaPlace, Louisiana

with forty three passengers and Mr. Bedell destined for Casino Magic in Bay St. Louis, Mississippi. As the bus headed to the Mississippi Gulf Coast, it traveled along the I-610 in New Orleans, Louisiana. The highway at the location of the accident approaches an overpass. Below was a golf cart path connecting the clubhouse to the golf course in City Park. There was 33 feet of guardrail along the right shoulder of the highway.

As the bus approached the overpass, it left the highway off the right shoulder through the guardrail. It then traveled down a grassy vertical slope, became airborne and landed on a far side embankment where it came to its final rest. Twenty two passengers died and twenty one were injured as a result of this accident.

This matter proceeded to a thirteen day bench trial on liability over a two month period against the State of Louisiana, through the Department of Transportation and Development ("DOTD") on theories of strict liability and negligence for defective design, condition, and maintenance of the guardrail.[1]

Eleven wooden posts that supported the guardrail were damaged when struck by the bus. Plaintiffs introduced evidence that some of the posts were infested with termites. They contend

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1 The parties agreed to separate trials on the issues of liability and damages pursuant to La. C.C.P. Art 156A. Plaintiffs entered into a settlement agreement with other defendants in suit filed in United States District Court for the Eastern District of Louisiana.

DOTD failed to properly maintain and repair the posts which substantially contributed to this accident. However, the Court finds the evidence failed to show by a preponderance that the termites caused the posts to break.

The factual testimony from two eyewitnesses to this accident, Margaret and Joseph Messore, establish that the Custom bus was traveling east on I-610. The Messores estimated the bus speed at 50 to 60 miles per hour as it crossed the travel lanes of I-610 into the guardrail. Mrs. Messore testified after the bus went through the guardrail it swiped along side a portion of it for a few seconds creating sparks before it launched in the air and landed on the opposite embankment.

Sergeant Edwin Ducote supervised the investigation of the accident for the New Orleans Police Department. He testified the tire marks from the bus confirmed the bus left the roadway through the guardrail, over the golfers' path and landed on the other side. Sergeant Ducote added the path of the bus and distance traveled is consistent with a bus speed of fifty to sixty miles per hour.

Ric Robinette, plaintiffs' accident reconstructionist, testified to a bus speed of fifty to sixty miles per hour, but added it could have been as low as forty miles per hour when it launched over the golf cart path. According to Mr. Robinette, it was difficult to say what caused the bus to launch in the air, but tire marks indicated the bus first left the roadway on its passenger side. As the bus went through the

guardrail, it dragged a portion of the railing with it before it launched over the golf cart path and collided with the eastern side of the embankment. Mr. Robinette stated the golf cart path was slightly less than ten feet below the highway.

The State's accident reconstructionist, Brian McHenry, testified the bus was traveling approximately seventy miles an hour as it left the highway and launched over the golf cart path. His opinion was based on an analysis of factors including where the bus left the roadway, its initial point of launch, and final resting place as well as the length of the bus. It was Mr. McHenry's opinion that the bus was 45.5 feet long.

However, Ric Robinette testified the length of the bus was shortened at its final point of rest because of its collision with the east side of the embankment. According the Mr. Robinette, it is impossible to know the exact length of the bus immediately following impact because it may have been shortened six feet or more. There is no evidence of any measurements taken at that time. Thus, the Court finds Mr. McHenry failed to properly calculate the length of the bus and discredits his opinion because it is not supported by sound methodology and is outweighed by other factual and expert testimony.

The I-610 at the location of the accident was originally constructed by DOTD in 1971 and underwent major reconstruction in 1989. In 1987 and 1988, the design phase included a breakaway guardrail system that was intended to redirect a

4500 pound vehicle. The Custom bus with passengers weighted in excess of 35,000 pounds.

Arthur Barrow, plaintiffs' expert highway design engineer, testified the guardrail was underdesigned for the area it was intended to protect. According to Mr. Barrow, if the guardrail system had a higher level of crash worthiness, there is a good chance this accident would have never occurred. A guardrail designed with a higher crashworthy rating would have redirected the bus and it would not have penetrated the guardrail and impacted the far side embankment given its speed as testified to by Ric Robinette. It is Mr. Barrow's opinion that a guardrail with a higher crashworthy rating would have protected the driver and passengers on the Custom bus from the type of accident that occurred.

La. R.S. 48:35A(1) requires DOTD to adopt minimum safety standards regarding highway design, construction, and maintenance conforming to the standards approved by the American Association of State Highways and Transportation Officials (AASHTO) whenever possible. *Dill v. State, DOTD,* 545 So.2d 994, 996 (La. 1989). These design standards are known as the Roadside Design Guide.

The 1989 Roadside Design Guide was in effect at the time of construction of the guardrail on the I-610 where the accident occurred. (Defendant's Exhibit 1). DOTD argues the 1989 Roadside Design Guide did not have objective criteria requiring the use of a stronger guardrail system.

Richard Robertson, defendant's expert in traffic engineering and roadway and guardrail design, testified the 1989 Roadside Design Guide provided considerations for guardrail systems capable of redirecting vehicles weighing as much as 80,000 pounds but only required a guardrail designed for a 4,500 pound vehicle. According to Mr. Robertson, the State met the minimum AASHTO standards for guardrails.

Design standards at the time of original construction and at the time of the accident may be relevant factors in deciding liability of DOTD, but are not determinative of the issue of a hazardous defect. DOTD cannot escape liability by simply showing that a highway met the existing standards when built. *Dill*, id. at 996.

The Court in *Rosen v. State of Louisiana,* 809 So.2d 498, 201-0499 (La. App. 4 Cir. 1/30/02) articulated the duty of the Department of Transportation and Development (DOTD) to maintain its highways:

> DOTD has a legal duty to maintain the highways in a reasonably safe condition, *Sinitiere v. Lavergne*, 391 So.2d 821, 824 (La. 1980). The duty "extends to the protection of those people who may be forceably placed in danger by an unreasonably dangerous condition." *Id*, at 825. It extends not only to prudent and attentive drivers, but also to motorists who are slightly exceeding the speed limit or momentarily inattentive. *Trahan v.*

State, Department of Transportation & Development, 536 So.2d 1269, 1273 (La.App. 3 Dir. 1988), *writ denied*, 541 So.2d 854 (La. 1989). DOTD cannot knowingly allow a condition to exist that is a hazard to a reasonably prudent driver. In such a case, DOTD must take reasonable measures to eliminate or reduce the risks associated with the dangerous condition or may post adequate signs to warn the public of the danger, risk, or hazard involved. *Id.* At 1273.

Whether the roadway at the scene of an accident is in an unreasonably dangerous condition depends upon the facts and circumstances of each case. *Hunter v. Department of Transportation and Development*, 620 So.2d 1149, 1151 (La. 1993). DOTD cannot escape liability by simply showing that the highway met the existing standards when it was built. *Audoin v. State, Department of Transportation and Development*, 97-1938, 97-1967, p. 6-8 (La. 4/24/98), 712 So.2d 62, 66-67. Design standards both at the time of original construction and at the time of the accident may be relevant factors in determining whether a

> given stretch of roadway presents an unreasonable risk of harm, but are not determinative of the issue. *Dill v. State, Department of Transportation and Development*, 545 So.2d 994, 996 (La. 1989). Although DOTD does not have a duty to bring old highways up to modern AASHTO standards absent a major reconstruction of that highway, as explained by the Supreme Court in *Cormier v. Comeaux*, 98-2378, p. 9 (La. 7/7/99), 748 So.2d 1123, 1129, whether DOTD has conformed to those standards is a relevant factor in determining the ultimate issue of whether the roadway is unreasonably dangerous. *Aucoin*, 97-1938, 97-1967 at p. 7, 712 So.2d at 66.

In this case, the golf cart path was an "area of concern" on the 1988 design documents (Defendant's Exhibit 78). Defendant's expert, Mr. Robertson, admitted it was due to a perceived need a decision was made to keep the golf cart path. He categorized the area as a nontransversable hazard to all vehicles which had the potential to cause severe injury if impacted. Mr. Robertson also admitted it was foreseeable that vehicles would run off the road at that location and the purpose of a guardrail is to redirect vehicles and prevent impact with

obstacles.

Mr. Barrow testified that Section 1, 3, and 5 of the 1998 Roadside Design Guide list criteria for subjective consideration by a state's highway design engineer that recommend a stronger guardrail for a nontransversable hazard.

Chapter 5 of the 1989 Roadside Design Guide addresses guardrails. Section 5.3 entitled "Performance Level Selection Procedures" states in part:

> ...However, it has long been understood that barriers designed for cars should not be expected to perform equally well for larger vehicles, such as buses and trucks. Recognizing this fact, several highway agencies have developed and used barrier systems capable of redirecting vehicles as heavy as 80,000 pound tractor trailer combination trucks. Although objective warrants for the use of higher performance traffic barriers do not presently exist, subjective factors most often considered for new construction or safety upgrading include:
>
> • high percentage of heavy vehicles in traffic stream
>
> • adverse geometrics such as sharp curvature oftentimes combines with poor sight distance.
>
> • severe consequences associated with penetration of a

barrier by a large vehicle.

Thus, based on the evidence presented the Court finds DOTD knew or should have recognized the risk of serious harm associated with the installation of a guardrail system designed only to redirect cars along the I-610 where this accident occurred. The 1989 Roadside Design Guide clearly advised state highway agencies to consider the risk of harm if large vehicles penetrated a guardrail, especially in an area where a nontransversable hazard exists. DOTD's negligent conduct created an unreasonable risk of harm, not only for motorists, but also to those using the golfcart path below the highway.

Dr. Frank Griffith, an expert physicist called by the defendant, testified that at a speed of 60 miles per hour the bus could have stopped at the top of the vertical slope of the highway. However, "the failure of (the driver) to maintain control of the vehicle does not relieve DOTD of its duty to keep the highways safe". *Campbell v. Louisiana Dept. of Transp. and Development*, 94-1052 (La. 1/17/95), 648 So.2d 898, 903. The evidence supports a finding that the inadequate guardrail located where the Custom bus left the highway played a physical role in causing this accident.

The Court finds that while Frank Bedell's negligence caused the bus to leave the highway, the injuries to the plaintiffs were a direct result of impact with the launching of the bus and striking the far side embankment. (Plaintiffs'

Exhibit 1).

Therefore, the Court apportions fault equally between Frank Bedell as operator of the Custom Bus and defendant, State of Louisiana, Department of Transportation and Development.

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No. 08-1101

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SUPREME COURT, U.S.

In The

Supreme Court of the United States

STATE OF LOUISIANA, THROUGH THE DEPARTMENT OF TRANSPORTATION AND DEVELOPMENT,

Petitioner,

v.

LELIA MARIE TASSIN, WIFE OF/AND IRVING C. TASSIN, JR., ET AL.,

Respondents.

On Petition For A Writ Of Certiorari To The Court Of Appeal Of Louisiana, Fourth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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COUNTER-STATEMENT OF QUESTIONS PRESENTED

I. Did petitioner waive the argument of preemption where it did not properly raise it in the trial court?

II. Whether the petitioner has presented any compelling reasons to grant its petition where there are no conflicts between state courts of last resort, between federal appellate courts or between a state court of last resort and a federal appellate court; where there are no important issues of federal law that have not been decided by this court but should be; and where there is no federal preemption under the law and the facts of this case.

III. Whether the petitioner's writ application should be denied where the trial court made the correct determination under the law based on her evaluation of the credibility of the witnesses and the qualifications of the experts following a lengthy trial.

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INTRODUCTION

The granting of petitioner's application for a writ is neither necessary nor appropriate in this case. The petitioner attempts to expand the doctrine of preemption into a field and in a setting in which it has never been applied by this Court or by any Court to the knowledge of respondents. Highway defect cases have always been held to be a State matter to be determined under the State's tort law.

Here, three Louisiana courts, the Civil District Court for Orleans Parish, the Louisiana Fourth Circuit Court of Appeal, and the Louisiana Supreme Court, found that the State was partially at fault for this accident under Louisiana law. Their findings were correct and nothing in the federal law preempts or prevents their decisions. Petitioner presents no compelling reasons for this Court to grant the Petition for Writ of Certiorari.

The statutory law and this Court's existing decisions provide adequate guidance to lower courts on the issues in this case. No conflicts have arisen among the State courts or among the circuits. The writ application does not raise any new or novel questions of law. Thus, there is no reason to grant the writ application in this case.

The numerous deaths and injuries in this case could have been prevented had the State taken any one of several practical steps to eliminate what they recognized as an "area of concern". Respondents' experts testified about several simple steps that the

State could have taken to eliminate the danger and prevent the tragedy that occurred in this case. They could have chosen the correct roadside barrier. They could have placed culverts and filled in the ravine around the golf cart path. They could simply have relocated or redesigned the golf cart path.

The trial court correctly credited the testimony of plaintiffs' experts whose expertise has been recognized by the State. The trial court also correctly discounted the testimony of petitioner's experts which was tainted by errors and omissions.

COUNTER-STATEMENT OF THE CASE

This case involves a catastrophic bus accident in New Orleans, Louisiana which caused the deaths of 22 passengers and severe injuries to 21 others. At the location of the accident, I-610 spans over a golf cart path which is part of the city park golf course. Running under the interstate, the golf path presents a dangerous man made ravine with steep banks on each side. A hazardous situation is created in this location where the interstate runs through the golf course and over the dangerous ravine created by the golf path. The State itself recognized this dangerous situation as an "area of concern" in their design documents.

As found by both the Louisiana trial and appellate courts, the decisions made by the Louisiana DOTD in traversing the golf path created a very

dangerous condition which the DOTD recognized as an "area of concern". Petitioner's own expert admitted this was a dangerous non-traversable hazard. The testimony established that there were simple and cost effective solutions which would have eliminated the danger of this "area of concern". The State nevertheless failed to take any action at all to remedy this situation and opted for leaving the area as a danger and a hazard to motorists.

Not long after the start of the trip, the Custom Bus Charter's bus, driven by Frank Bedell gradually left the roadway. The eyewitness testimony of Mr. Messore who was traveling behind and passing the bus as it went through the guardrail put the speed of the bus at approximately 50 to 60 miles per hour.

His wife, Mrs. Messore, had a similar estimate, stating that the vehicle they were traveling in (which was overtaking the bus) was at a speed of approximately 60 to 70 miles per hour. Sgt. Mack with the NOPD testified that evidence was consistent with a speed of about 50 to 60 miles per hour. Plaintiff's expert, Ric Robinette, testified that based upon his reconstruction and the eyewitness testimony, the speed of the bus was between a low of approximately 40 mph and a high of approximately 60 mph. The speed estimate of petitioner's expert, Brian McHenry, was discounted by the trial court because it was based on calculations which failed to take into account the deformation or crushing of the bus upon impact and because it was at odds with the other expert and eye witness testimony. Indeed, Mr. McHenry, on cross

examination, stated that everything he did was on two CD's which were entered into evidence. He admitted on cross that if anything on those CD's were wrong, then his entire opinion was wrong. The calculations on the CD's were shown to be wrong because he did not take the deformity of the bus after the crash into consideration.

The bus did not swerve suddenly and violently into the guardrail. Instead, the path of the bus was described by the eye witnesses as gradual. Mrs. Messore testified that the bus proceeded across all the lanes of traffic and it appeared just like he was going to pull over and stop in the emergency lane. She described the movement of the bus as a "drift over". Mr. Messore similarly described the movement of the bus as "veering off to the right".

Despite the fact that the bus was not speeding and that its movement was a gradual "drift" or "veering off", the undersized guardrail failed to re-direct the bus which then traveled along the State's right of way and went airborne over the golf path and the dangerous ravine it created. It crashed into the steep opposite embankment, leading to the tragic consequences of this case.

The bus had a "very significant frontal impact" on the transverse slope. This resulted in "a tremendous amount of deformation in the inside of the bus".

The bus was crushed and crumpled in the center to the extent that the floor of the bus came very near

to the ceiling and caused the aforesaid injuries and deaths.

The guardrail in question was inadequate to redirect this vehicle away from the dangerous "area of concern" created by the golf cart path. It failed in its primary purpose. Instead of redirecting the bus it allowed the bus to go airborne over the ravine and crash into the opposite embankment. The evidence established that a proper guardrail or barrier would have prevented this accident and the deaths and injuries that occurred. The evidence also established that there were several other practical steps that the State could have taken that would have prevented this tragedy.

CONSIDERATIONS GOVERNING REVIEW ON CERTIORARI

None of the requirements of this Court's Rule 10 regarding considerations for granting a writ are met in this case.

Pursuant to Rule 10, review via writ of certiorari is a privilege and is not a right. This Court will not grant a writ application absent compelling circumstances. See *Youngblood v. West Virginia*, 547 U.S. 867 (2006).

In this case, there are no conflicting decisions between State courts of last resort, between federal appellate courts, or between a State court of last

resort and a federal appellate court. Moreover, there are no important questions of federal law that have not been decided but should be settled by this Court.

The application for a writ should be denied.

REASONS FOR DENYING THE WRIT

A. THE STATE DID NOT PRESERVE A PREEMPTION DEFENSE IN THE LOWER COURTS

The State, having lost on the merits in all three lower courts, now turns to a preemption argument. However, this argument is unpersuasive and is contrary to the law and jurisprudence. The law of this State is crystal clear that Louisiana tort law principles govern this matter. Federal law does not preempt the State tort law in this case for several reasons.

First, the appellate courts of Louisiana have held that where preemption is not specifically pled as an affirmative defense in the Answer, *and* brought to the trial court's attention that it will not be considered by the appellate court. *Snearl v. Mercer*, 780 So.2d 563, 572 (La. App. 1 Cir. 2001); *Cooper v. Borden*, 30,292, 707 So.2d 898 (La. App. 2 Cir. 1998).

In *Snearl*, the First Circuit found that in a case where the affirmative defense of preemption was not raised in the Answer and was not the subject of specific motion practice, it was too late for the

petitioner to raise it in its appeal. In the case now before the court, petitioner has not squarely raised the issue of preemption in its answer, in the trial or even explicitly in its appellate brief in the Fourth Circuit. Thus, even if federal law applied and could be said to preempt State law (which it does not as shown below) the petitioner failed to raise the issue of preemption and thereby waived it.

Petitioner should not be allowed to bring up these issues for the first time in the higher discretionary review Courts. The State brought up no Supremacy clause arguments nor any "conflict preemption" arguments in the trial court or the State court of appeal below. Thus, they waived those arguments.

B. THERE IS NO FEDERAL LAW PREEMPTION IN THIS CASE

Even if the State had properly preserved a preemption defense, their argument still fails. There is no federal law preemption under the facts and the applicable law of this case. The Louisiana Courts reached the correct results. The State itself recognized that this location (where the interstate spanned a golf cart path) was an "area of concern".

As shown by the recent United States Supreme Court case of *Wyeth v. Levine*, 06-1249, (March 4, 2009) 2009 WL 529172, a doctrine that should only be

invoked pursuant to clear Congressional mandate. There is no such mandate in this case. Congress never intended to preempt State tort law in this field.

Moreover, the Louisiana Courts have consistently held that preemption does not apply in cases involving highway design. *Wingfield v. State, through La. DOTD*, 2001-CA-2668, 835 So.2d 785 (La. App. 1 Cir. 2002), writ denied, 845 So.2d 1060, 2003-0349 (La. 5/30/03); WC denied, 540 U.S. 950, 124 S.Ct. 419, 157 L. Ed. 2d 282, No. 03-346 (10/14/03).

The *Wingfield* case involved a tractor trailer accident on the interstate near the Baton Rouge bridge where the truck rolled over a highway ramp railing when entering a sharp curve landing on the highway below. A jury in the district court found that the site was unreasonably dangerous because of defective design and had inadequate warning signs. DOTD was held 54% at fault in relation to the driver.

The preemption issue was raised in *Wingfield* all the way to this Court. The facts and issues in that case are very similar to those in the instant case. In *Wingfield,* the Louisiana appellate court said that "Tort law falls within the traditional power of the state to protect its citizens" and found that 23 U.S.C. § 101, et seq. did not preempt State law causes of action for accidents resulting from highway design. The Louisiana Supreme Court and this Court denied a writ. DOTD now tries to make the same preemption

argument 6 years later. However, they fail to mention the *Wingfield* case at all in their writ application.

The arguments put forward by the State are in direct contradiction of the holdings of Louisiana Courts in the cases of *Dill v. State Dept. of Transportation and Development*, 545 So.2d 994 (La. 1989); and *Aucoin v. State Through Department of Transportation and Development*, 712 So.2d 62 (La. 1998).

Dill and *Aucoin* both stand for the proposition that Louisiana Courts are not limited by the guidelines although such guidelines can be facts in the courts' determination. There is simply no authority, statutory or jurisprudential for imposing federal law preemption over this State's well thought out and well established tort law in this case. Louisiana's tort law was properly applied in this case.

There is nothing unconstitutional about the Courts of Louisiana applying Louisiana's tort law concepts. No federal law prevents it. Moreover, there is no federal law which is at odds with the decision of the trial Court. The State admitted as much in its brief in the Louisiana Courts, stating ". . . federal laws do not preempt Louisiana tort law causes of action." (State's writ application to the Louisiana Supreme Court, p. vii). That statement is correct. Federal law does not preempt this area. The State's writ application should be denied.

The only case cited by the petitioner in its entire writ application is *Norfolk Southern Railway Company v. Shanklin*, 529 U.S. 344, 120 S.Ct. 1467,

146 L. Ed. 2d 374 (2000). However, that case is clearly distinguishable from this one. That was a railroad case and dealt with an entirely different statutory and regulatory scheme. This case does not deal with railroads in any way and deals with an area which has always traditionally been a State tort law matter. Principles of comity weigh heavily against any findings of preemption. Moreover, there is no congressional or even regulatory language which in any way would authorize a preemption finding in this case.

It should also be noted that, even in railroad cases, Congress has amended 49 U.S.C. § 2016 to clarify that State tort law is not preempted in many instances. The Eighth Circuit's decision in *Lundeen v. Canadian Pacific Railway Company*, 07-1656, 532 F.3d 682 (8th Cir. 2008) reviewed the history of preemption in railroad cases. That decision and the congressional amendments to Section 2016 indicate that preemption should not be found absent clear congressional intent. There is no such intent in this case.

C. THE DECISIONS OF THE LOUISIANA COURTS WERE CORRECT

The Louisiana courts decided this case properly. There are simply no federal considerations that would prompt this Court to grant a writ. This Court should deny the State's writ application. After many years of discovery and pre-trial procedure, the trial court held 13 days of trial. Judge Ledet heard first

hand from the fact witnesses and the expert witnesses and she viewed first hand the evidence presented by both sides. Her decision that the State was 50% at fault was correct and should not be disturbed. The Fourth Circuit, after extensive briefing and full oral argument, properly affirmed the trial court. The Louisiana Supreme Court denied the State's writ application.

The petitioner's arguments are without merit. The lower courts correctly applied Louisiana tort law to this case and properly found that the State breached its duty of care. The State's writ application should be denied.

The trial court correctly weighed the credibility of the witnesses, both fact and expert. The experts who testified for plaintiff were all highly qualified. Plaintiffs' expert, Ric Robinette, has worked extensively for the State as an expert witness. The Fourth Circuit correctly upheld the trial court's determinations regarding the testimony of the expert witnesses who testified for both sides.

The trial court, the Fourth Circuit and the Louisiana Supreme Court, correctly found that the golf cart path and the interstate highway and shoulder in this area were unreasonably dangerous. The State recognized that this was an "area of concern" on the 1988 design documents by the LOTD which was submitted into evidence. Petitioner's expert, Mr. Robertson, admitted it was due to a perceived need and a decision was made to keep the golf cart path.

He characterized the area as a non-traversable hazard to all vehicles which had the potential to cause severe injury if impacted. Mr. Robertson admitted that it was foreseeable that vehicles would run off the road at that location and the purpose of a guardrail is to redirect vehicles and prevent impact with obstacles. The barrier was undersized for the area it was intended to protect.

Art Barrow, plaintiffs' expert, testified that the State did not act as a competent engineer and that the design created an unreasonable risk of harm and was therefore defective. Mr. Barrow opined that the State could have extended the culvert and covered it or relocated it or redesigned it. They chose not to. The determinations of the trial court and the Fourth Circuit were eminently right.

The trial court and the Fourth Circuit properly apportioned fault at 50% to Frank Bedell and 50% to the State. The Louisiana Supreme Court properly denied a writ. These determinations were well within the fault apportionment in similar cases and are well supported by the facts of this case.

There is no preemption in this case. The State never properly presented a preemption argument in the Courts below and thus did not preserve the issue for this Court. Moreover, this is not a case in which preemption is applicable. This is a matter of traditional State law and was properly decided by the

State Courts. The Louisiana Courts reached the right decision.

CONCLUSION

For all the foregoing reasons discussed herein, the Petition for Writ of Certiorari should be denied. The Louisiana courts reached the correct decision. The State failed to timely bring up their preemption argument and there is no federal law preemption under the facts of this case.

The 43 people who were killed and/or injured as a result of this "area of concern" were predominately elderly people who were on a Mother's Day bus trip. For these people, justice delayed is truly justice denied. Some who survived the accident have passed away in the 9+ years since it occurred. Many of the remaining passengers are ill and most are elderly. petitioner's writ application should be denied.

Respectfully submitted,

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